

San Francisco Law Library

436 CITY HALL

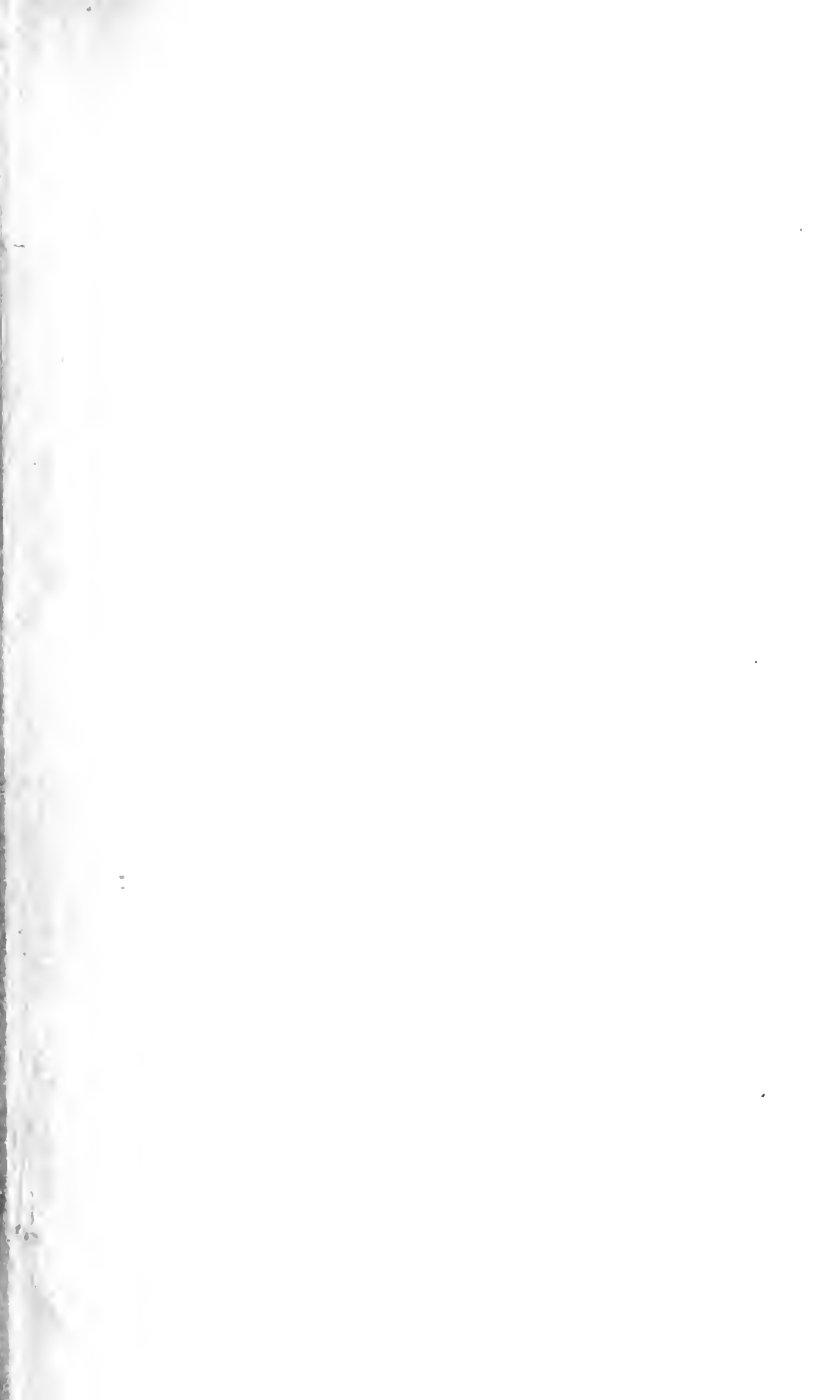
No. 133384

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

7073
No. 11769

United States
Circuit Court of Appeals
For the Ninth Circuit.

ACHILLE BIANCHI and
MARLO PACKING CORPORATION,

Appellants,

vs.

ARTHUR E. H. BARILI,

Appellee.

ARTHUR E. H. BARILI,

Appellant,

vs.

ACHILLE BIANCHI and
MARLO PACKING CORPORATION,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
DEC 21 1947

PAUL P. O'BRIEN,
CLERK



No. 11769

United States
Circuit Court of Appeals
For the Ninth Circuit.

ACHILLE BIANCHI and
MARLO PACKING CORPORATION,

Appellants,

vs.

ARTHUR E. H. BARILI,

Appellee.

ARTHUR E. H. BARILI,

Appellant,

vs.

ACHILLE BIANCHI and
MARLO PACKING CORPORATION,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Alan Franklin, Supporting Motion for Relief from Judgment	17
Affidavit of W. Bruce Beckley, Supporting Mo- tion for Relief from Judgment.	16
Answer	5
Appeal:	
Certificate of Clerk to Transcript of Rec- ord on	41
Cost Bond on.	30
Designation of Contents of Record on.	33
Notice of.	29, 36
Plaintiff's Designation of Contents of Rec- ord on	38
Statement of Points on Which Appellants Intend to Rely on.	188
Statement of Points on Which Appellant Barili Intends to Rely on.	191
Certificate of Clerk to Transcript of Record on Appeal	41
Complaint for Infringement of Letters Patent No. 1,844,142	2
Cost Bond on Appeal.	30
Designation of Contents of Record on Appeal.	33

	INDEX	PAGE
Exhibit (Defendants') C—Excerpt from file wrapper of United States Patent Office in the matter of the Letters Patent of Arthur E. H. Barili, No. 1,844,142, granted 2/9/32, for Improvement in Stuffed Pastry Machines		156
Final Decree		14
Final Judgment.....		27
Findings of Fact and Conclusions of Law.....		23
Conclusions of Law.....		25
Findings of Fact.....		24
Interrogatories of Defendants Achille Bianchi and Marlo Packing Corporation, and Answers Thereto		8
Memorandum Opinion.....		20
Minute Order Granting Motion for Relief from Judgment, Denying Motion for Security of Costs and Attorneys Fees.....		19
Motion for Relief from Judgment and to Reset for Trial		15
Names and Addresses of Attorneys.....		1
Notice of Appeal.....	29,	36
Notice Setting Case for Trial, 11/25/46.....		7
Notice Setting Case for Trial, 12/ 3/46:.....		8
Order Exhibits Be Not Printed.....		190
Order Extending Time to Docket.....		40
Plaintiff's Designation of Contents of Record on Appeal.....		38

INDEX

PAGE

Reporter's Transcript	42
Motion to Set Trial Date.....	42
Motion for Relief from Judgment	44
Witness, Defendants':	
Bianchi, Achille	
—direct	106
—cross	116
Witnesses, Plaintiff's:	
Barili, Arthur E.	
—direct	51, 68, 103
—cross	71, 104
—redirect	78
—recross	80
Bianchi, Achille	
—direct	92
—cross	97
—redirect	98
Cortopasse, Carlo	
—direct	88
—cross	91
Gierth, Herbert	
—direct	66
Statement of Points Relied Upon.....	32
Statement of Points.....	36
Statement of Points on Which Appellant Barili Intends to Rely on Appeal and Designation of Additional Parts of Record for Printing..	191
Statement of Points on Which Appellants In- tend to Rely on Appeal and Designation of Parts of Record for Printing.....	188



NAMES AND ADDRESSES OF ATTORNEYS

J. E. TRABUCCO,
550 Russ Building,
San Francisco, California.

Attorney for Defendants and Appellants.

ALAN FRANKLIN,
356 South Spring Street,
Los Angeles, California.

BOYKEN, MOHLER & BECKLEY,
W. BRUCE BECKLEY,
723 Crocker Building,
San Francisco, California.

Attorneys for Defendants and Appellees.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 26534-H

ARTHUR E. H. BARILI,

Plaintiff,

vs.

ACHILLE BIANCHI, MARLO PACKING COR-
PORATION, a corporation, SUPERBA
PACKING CO., LTD., a corporation, and
PETE MEDA, d/b/a MEDA BROS.,
Defendants.

COMPLAINT FOR INFRINGEMENT OF
LETTERS PATENT No. 1,844,142

To the Honorable, the Judges of the United States
District Court for the Northern District of
California, Southern Division

Plaintiff for his complaint alleges as follows:

I.

Plaintiff, Arthur E. H. Barili, is a citizen of the
United States and a resident of Los Angeles, in the
County of Los Angeles and State of California.

II.

Defendant, Achille Bianchi, is a resident of the
City and County of San Francisco, State of Califor-
nia, in the Northern District of California, Southern
Division.

III.

Defendant, Marlo Packing Corporation, is a corporation, [1*] duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business located in the City and County of San Francisco, State of California, in the Northern District of California, Southern Division.

IV.

Defendant, Superba Packing Co., Ltd., is a corporation, duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business located in the City and County of San Francisco, State of California, in the Northern District of California, Southern Division.

V.

Defendant, Pete Meda, doing business as Meda Bros., is a resident of the City of Sacramento, County of Sacramento, and State of California, in the Northern District of California, Northern Division.

VI.

The jurisdiction of the Court is grounded upon the patent laws of the United States, and particularly upon Section 24 of the Judicial Code, (U. S. C., Title 28, Sec. 41), Paragraph Seventh, and R. S. Sec. 4921, (U. S. C., Title 35, Sec. 70).

* Page numbering appearing at foot of page of original certified Transcript of Record.

VII.

On February 9, 1932, United States Letter Patent No. 1,844,142, were duly and legally issued to plaintiff for an invention in a Stuffed Pastry Machine, and since that date plaintiff has been and still is the owner of those Letters Patent.

VIII.

Defendants have for a long time past been and still are jointly and severally infringing those Letters Patent by making, selling and using stuffed pastry machines embodying said patented invention, and will continue to do so unless enjoined by this Court. [2]

IX.

Plaintiff has placed the required statutory notice on all stuffed pastry machines manufactured and sold by him under said Letters Patent, and has given written notice to defendants of their said infringement.

Wherefore, plaintiff demands a preliminary and a final injunction against further infringement by defendants, and each of them, and those controlled by defendants, and each of them, an accounting for profits and damages, and order for delivery of infringing machines to U. S. Marshal and for destruction of said machines, and an assessment of costs against defendants.

ARTHUR E. H. BARILI,

By /s/ ALAN FRANKLIN,

Attorney for Plaintiff.

[Endorsed]: Filed Oct. 19, 1946. [3]

[Title of District Court and Cause.]

ANSWER

Come now the defendants Achille Bianchi and Marlo Packing Corporation, answering the complaint allege as follows:

1. These defendants do not deny the allegations of Paragraphs I, IV and V of the complaint, and admit the allegations of Paragraphs II and III.

2. These defendants do not deny that letters patent of the United States No. 1,844,142 were issued to plaintiff as set forth in Paragraph VII of the complaint, but they are not informed as to the alleged ownership by plaintiff of the said patent and therefore leave it to plaintiff to make such proof as he considers advisable.

5. These defendants deny the allegations of Paragraph VIII of the complaint. [4]

4. These defendants deny the allegations of Paragraph IX of the complaint.

Special and Affirmative Defenses

5. The said Letters Patent No. 1,844,142 are invalid for want of invention.

6. The said Letters Patent are invalid for the reason that all of the claims thereof include mere aggregations of old elements.

7. Further answering, these defendants aver that the said alleged invention purporting to be em-

braced in the said patent in suit was known and used by others in this country prior to the date of the supposed invention by plaintiff.

8. On information and belief these defendants allege that right of action set forth in the complaint against these defendants or either of them did not accrue within six years before the commencement of this action.

9. Further answering these defendants aver that plaintiff was not the original, true and sole inventor or discoverer of the alleged improvements or invention purporting to be covered by the patent in suit, or any material or substantial part or parts thereof, but said inventions and all material and substantial parts thereof had been disclosed to the public by others, invented by others, or patented by others than the said plaintiff prior to the dates of the alleged inventions thereof by the plaintiff, and for more than two years prior to February 9, 1932, as appearing in divers prior letters patent of the United States and foreign countries, as follows to-wit:

Holmes	518,454	April 17, 1894
Baier	769,932	September 13, 1904
Stenzy	775,152	November 15, 1904
Evans	1,094,320	April 21, 1914
Whitton	1,115,758	November 3, 1914
Frahm	1,487,226	March 18, 1924
British to Burns.....	181,567	June 22, 1922

Wherefore, these defendants pray that the Letters Patent in suit be held invalid, or in the alternative,

not infringed; that the complaint be dismissed; that defendants be awarded their costs herein incurred; and for such other relief as may appear to the court to be just.

/s/ J. E. TRABUCCO,

Attorney for Defendants,

Achille Bianchi and Marlo

Packing Corporation.

[Endorsed]: Filed Nov. 22, 1946. [6]

[Title of District Court and Cause.]

NOTICE

To Robert A. Zarick, Esq., 413 Capital National Bank Bldg., Sacramento, California; Messrs. Naylor and Lassagne, 2607 Russ Building, San Francisco 4, California; J. E. Trabucco, Esq., 550 Russ Building, San Francisco 4, California:

You Are Hereby Notified that on December 2, 1946, the above entitled case will appear on the Law and Motion calendar of Judge George B. Harris to be set for trial.

C. W. CALBREATH, *jes.*

Clerk, U. S. District Court.

San Francisco, California, November 25, 1946.

[Title of District Court and Cause.]

NOTICE

To Robert A. Zarick, Esq., 413 Capital National Bank Building, Sacramento, California; Messrs Naylor and Lassagne, Russ Building, San Francisco 4, California; J. E. Trabucco, Esq., 550 Russ Building, San Francisco 4, California:

You Are Hereby Notified that on December 2, 1946, Judge George B. Harris ordered that the trial in the above entitled case be set for February 6, 1947.

C. W. CALBREATH,
Clerk, U. S. District Court.

San Francisco, California, December 3, 1946.

[Title of District Court and Cause.]

INTERROGATORIES OF DEFENDANTS
ACHILLE BLANCHI AND MARLO PACK-
ING CORPORATION, AND ANSWERS
THERE TO

Now comes the defendants Achille Bianchi and Marlo Packing Corporation, and under the provisions of Rule 33 of the Rules of Civil Procedure, propound the following interrogatories to plaintiff, to be answered by him under oath:

Interrogatory No. 1. State when plaintiff first

learned of the alleged infringement by defendant Achille Bianchi of the patent in suit.

Answer to Interrogatory No. 1. Approximately some time during the month of July, 1946.

Interrogatory No. 2. State when plaintiff first learned of the alleged infringement by defendant Marlo Packing Corporation of the patent in suit.

Answer to Interrogatory No. 2. About July 15, 1946.

Interrogatory No. 3. State how and when written notice was first given to defendant Achille Bianchi of his alleged infringement of the patent in suit; and if such written notice was actually given, attach a copy thereof to your answers to these interrogatories.

Answers to Interrogatory No. 3. It is believed that a letter was written to defendant Achille Bianchi, on August 7, 1946, notifying him of his infringement of the patent in suit, but a copy of said letter has not at this time been found in the files of my attorney. The complaint in this suit, filed on October 19, 1946, and served on defendants, is written notice to said defendant Bianchi, of his infringement of the patent in suit.

Interrogatory No. 4. State how and when written notice was first given to defendant Marlo Packing Corporation of its alleged infringement of the patent in suit; and if such written notice was actually given, attach a copy thereof to your answer to these interrogatories. [9]

Answer to Interrogatory No. 4. A letter was written by my attorney, on August 7, 1946, to the defendant, Marlo Packing Corporation, as follows:

August 7, 1946.

“Marlo Packing Co.,
35 Williams Avenue,
San Francisco, California

Gentlemen:

I hereby notify you that the Stuffed Pastry Machine built by one, Bianchi, of San Francisco, and used by your company is an infringement of the patent issued to my client, Arthur E. H. Barili, February 9, 1932, No. 1,844,142.

Unless a satisfactory settlement is made for such infringement I am instructed to bring suit against your company for damages and an injunction.

Yours Very Truly,

ALAN FRANKLIN.”

Interrogatory No. 5. State which of the several claims of the patent in suit plaintiff will rely upon and urge that each defendant, Achille Bianchi and Marlo Packing Corporation, has infringed.

Answer to Interrogatory No. 5. Possibly Claim 1, and Claims 2, 3, 4, and 5.

Interrogatory No. 6. Precisely what does plaintiff assert or claim is new and patentable in each of the claims of the patent in suit charged to be infringed?

Answer to Interrogatory No. 6. The combinations of elements recited in the claims charged to be infringed.

Interrogatory No. 7. Precisely where, in the alleged infringing devices of Achille Bianchi and Marlo Packing Corporation is there found the features set forth as new and patentable in response to Paragraph 6 hereof, and in that connection plaintiff will:—

(a) Point out by reference characters applied to drawings, photographs or other suitable illustrations of each of these defendant's alleged infringing device or devices the elements of each of the claims of the patent in suit alleged to be infringed.

(b) Point out by reference characters applied to drawings, photographs or other suitable illustrations of each of these defendant's [10] alleged infringing device or devices the features set forth as new and patentable in response to paragraph 6 hereof.

Answer to Interrogatory No. 7. (a): Claim 1. On the attached print 11 and 12 are the intergeared rollers. Rollers designated 5 and 6, and 7 and 8, tables 3 and 4, chain 39 extending over sprockets 39^a and 39^b and chain 44 extending over sprockets 44^a and 44^b are the means for forming and feeding the sheets of flour paste to rollers 11 and 12. The open-bottom straight-sided hopper for guiding stuffing to the paste sheets on the rollers 11 and 12 is indicated 20; bottom edges 20' of said hopper shaped to conform to contour of rollers 11 and 12. Means on the rollers for cutting the stuffed paste sheets into squares are the annular cutters 13 and

14 and the axial cutters 15 and 16. Rollers 11 and 12 are provided with deep square molds 11^a and 11^b, and 12^a and 12^b, into which the stuffed paste is free to enter, and said rollers have broad peripheral margins 11^c and 12^c between the molds and cutting means 13, 14, 15 and 16, between which margins the paste sheets become firmly pressed together and the stuffing expelled from said marginal portions.

Claim 3, Corresponding elements of this claim are the same as those designated above in Claim 2. In this claim 3 is also specified weight insertable loosely in the hopper 20 for pressing the stuffing against the paste sheets. In the Bianchi and Marlo machines a heavy wooden bar about 2" x 4" was used in the hopper for pressing the stuffing down against the paste sheets.

Claim 4. Corresponding elements of this claim are the same as those above designated in Claim 2. In addition this claim 4 specifies a detachable open bottom hopper for guiding stuffing to the paste sheets on the rollers. In the Bianchi and Marlo machines the hopper 20 is detachably mounted on angle bars 7', threaded vertical stud rods 76 and nuts 77 on said rods supporting said angle bars.

Claim 5. Corresponding elements of this claim are the same as [11] those above designated in Claim 2. The means for adjusting the hopper 20 vertically to accommodate paste sheets of various thickness are the angle bars 75, threaded vertical stud rods 76 and nuts 77 on said rods supporting said angle bars.

(b) The features are the same as the elements pointed out above in (a).

Interrogatory No. 8. Specify how, when and in what manner defendants Achille Bianchi and Marlo Packing Corporation have jointly infringed the patent in suit.

Answer to Interrogatory No. 8. Defendant, Achille Bianchi, built a stuffed pastry machine, which infringes the patent in suit, and sold said machine to defendant, Marlo Packing Corporation, which defendant used said machine for making ravioli. Said machine, according to information which I obtained from the latter defendant, was later sent back to the defendant, Achille Bianchi, for repairs which were made by said defendant, Bianchi.

Interrogatory No. 9. Has plaintiff received compensation from others for the use of any ravioli machine made by defendant Achille Bianchi?

Answer to Interrogatory No. 9. (No answer.)

Interrogatory No. 10. If your answer to interrogatory 9 is in the affirmative, state from whom such compensation was received, the amount of such compensation, and the date when the compensation was received.

Answer to Interrogatory No. 10. (No answer.)

[Endorsed]: Filed Jan. 2, 1947. [12]

In the United States District Court for the
Northern District of California, Southern
Division

Civil Action No. 26534-H

ARTHUR E. H. BARILI,

Plaintiff,

vs.

ACHILLE BIANCHI, MARLO PACKING COR-
PORATION, a corporation, SUPERBA
PACKING CO., LTD., a corporation, and
PETE MEDA, doing business as Meda Bros.,
Defendants.

FINAL DECREE

This cause came on to be heard, evidence was submitted on behalf of defendants and the cause was argued by counsel for defendants, and thereupon, upon consideration thereof, the Court having made and entered its Findings of Fact and Conclusions of Law herein, in accordance therewith,

It Is Hereby Ordered, Adjudged and Decreed as follows, viz:

1. That none of the patent claims of the patent in suit has been infringed by defendants, or either of them.
2. That the bill of complaint herein be, and the same is, hereby dismissed.
3. That plaintiff pay the defendants Achille Bianchi and Marlo Packing Corporation the

sum of Five Hundred Dollars [13] (\$500.00)
for Court costs and counsel fees.

Dated this 7th day of February, 1947.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Feb. 7, 1947. [14]

[Title of District Court and Cause.]

MOTION FOR RELIEF FROM JUDGMENT
AND TO RESET FOR TRIAL

Plaintiff moves the Court to vacate the Order for Judgment, dated February 6, 1947, and the Decree, entered herein on February 7, 1947, on the ground that the decree was entered and judgment was taken against plaintiff through mistake, inadvertence and surprise as more fully appears from the affidavit of W. Bruce Beckley, attached hereto.

Plaintiff further moves the court for an order resetting the cause for trial.

ALAN FRANKLIN,
BOYKEN, MOHLER &
BECKLEY,
W. BRUCE BECKLEY,
Attorneys for Plaintiff.

Dated February 13, 1947. [15]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
City and County of San Francisco—ss.

W. Bruce Beckley, being duly sworn, deposes and says that Alan Franklin, Esq., is attorney of record for plaintiff in the action *Barili v. Bianchi et al.*, pending herein; that on two occasions, at the request of Mr. Franklin, he argued preliminary motions on behalf of plaintiff; that the action was set for trial at some time unknown to affiant; that affiant is informed by telephone by Mr. Franklin and believes that Mr. Franklin received no notice that the cause was to be set for trial or that it had been set for trial as provided in Rule 7 of this court, and that he had no other notice of the date set for trial; that affiant is informed by the clerk of this court and believes that no such notice was sent to Mr. Franklin, that on February 5, 1947, the Clerk called affiant's office asking if the action was ready for trial but that both affiant and Mr. A. W. Boyken were out of San Francisco at that time and remained out of the city until the following week; that no other person in affiant's office had any knowledge of the case; that affiant has discussed the matter with Mr. Franklin by telephone and that Mr. Franklin stated that he is preparing an affidavit setting forth the above facts. [16]

W. BRUCE BECKLEY.

Subscribed and sworn to before me this 13th day of February, 1947.

[Seal]

[Signature illegible]

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 4, 1950.

[Endorsed]: Filed Feb. 13, 1947. [17]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Alan Franklin, being first duly sworn, deposes
and says:

I am the attorney for the plaintiff, Arthur E. H. Barili, in the above-entitled action. I am informed that, on February 6, 1947, said action was tried on its merits by the above-entitled Court, without the presence of counsel for the plaintiff therein, and that a final decree was entered in said action against the plaintiff on February 7, 1947. I understood that Rule 7 of the Rules of Practice of said Court required that all civil cases be placed on a Preliminary Calendar thirty-five days after filing the same and that counsel for all parties should be notified for the purpose of discussing matters relative to settlement of pleading, etc., and that all cases should remain on said calendar until set for trial. I have not received such a notice, or any notice whatever that the above-entitled case was to be set for trial, nor have I received any notice or been advised that

said case had been so set. I knew nothing about the setting and trial of said case until February 8, 1947, when I received a notice, dated February 7, 1947, from the Clerk of said Court, that said Court had ordered that judgment be entered for the defendants in said case and that plaintiff be required to make partial payment of \$500.00 on account of costs to be allowed the defendants. I have been informed for the first time, upon reading the Findings of Fact and Conclusions of Law in said case, filed by the attorney for Achille Bianchi and Marlo Packing Corporation, a corporation, defendants in said case, that said action had been dismissed as to the [18] defendant Pete Meda in said action. The said trial, decree and dismissal in said action were certainly a great surprise to me.

/s/ ALAN FRANKLIN.

Subscribed and sworn to before me this 13th day of February, 1946.

[Seal] GEORGE MULLIS,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires March 22, 1947.

[Endorsed]: Filed Feb. 18, 1947. [19]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 10th day of March, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable George B. Harris,
District Judge.

[Title of Cause.]

ORDER GRANTING MOTION FOR RELIEF
FROM JUDGMENT, ORDER DENYING
MOTION FOR SECURITY OF COSTS,
ETC.

This case came on regularly this day for hearing of motion for relief from judgment, motion to reset for trial, and motion for security of costs and attorney fees. After hearing Mr. Franklin and Mr. Beckley, for plaintiff, and Mr. Trubucco, for defendant, it is Ordered that the motion for relief from judgment be granted, and that the motion for security of costs, etc., be denied. Further Ordered that trial be set for March 11, 1947 (Count). [20]

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 26534-H

ARTHUR E. H. BARILI,

Plaintiff,

vs.

ACHILLE BIANCHI, and MARLO PACKING
CORPORATION, a corporation,

Defendants.

MEMORANDUM OPINION

Plaintiff, inventor of a ravioli machine, sues the defendants for infringement of his patent, No. 1,844,142, granted on February 9, 1932. Plaintiff initially contended that several claims were violated by defendant Bianchi in the construction of the machine used in the production of ravioli by defendant, Marlo Packing Corporation.

As early as 1927, plaintiff applied to the patent office for the issuance of the patent on his automatic ravioli making machine. During the course of five years, the [21] patent office examined plaintiff's claims in the light of the prior art. Particular attention was paid to a confection molding machine devised by one Holmes. In view of the Holmes invention and other machines developed, plaintiff's early claims were rejected. Not until plaintiff had narrowed his description to a point where it clearly set forth machinery that was novel in the manu-

facturing process did the patent office finally give approval to his claims, which ultimately numbered five. Claim 4 was amended in accordance with language suggested by the patent office in order to accurately represent the device.

During the trial, plaintiff and defendants narrowed the issue to claim 4, which describes the mechanism for the compression of the ravioli after the two sheets of dough have acquired the stuffing from a hopper. By means of a pair of rollers, one of which contains a series of molds and a set of axial blade cutters extending between the molds, and the other containing annular blade cutters running opposite wide marginal surfaces between the molds, the ravioli are shaped, the borders are compressed and the edges are cut into the final ravioli shape.

Defendants' machine follows the description set forth in claim 4 of plaintiffs' patent with one exception, which is an equivalent of plaintiff's device, namely: Defendant has transposed the annular blade cutters from the roller which contains the molds to the opposite roller which thus contains both annular and axial blades. [22]

Such transposition does not change the mechanical function, or operation of the machine, and is not the basis for a valid distinction between defendants' ravioli machine and that described in claim 4 (Walker on Patents, Deller's Ed. Vol. 3, Sec. 463, pp. 1699-1670).

Defendant places emphasis on the fact that the word "contact" is used by plaintiff in a descrip-

tion of his machine to indicate the method under which the rollers operate, and asserts that the word contact means "touch." Defendants' machine does not have such actual meeting of the parts on the opposite and revolving rollers. Rather, the dough itself touches when it is compressed and cut at the edges. The same operation occurs in plaintiff's machine as shown by the patent diagram.

Despite defendants' contention that the word contact means "touch," the Court is not persuaded to accept such a definition, nor to find a distinction in the two machines based on a refined dictionary definition which has no place in the terminology of scientific text books. In *Stuart Oxygen Company, Ltd., a corporation, vs. William Josephian, No. 11,445*, decided June 18, 1947, 9th Cir., the court in disposing of a similar contention based upon a refinement of definition said in speaking of the device in question: "The units are substantially identical in construction and perform their function in substantially the same way."

In the case at bar, as plaintiff has demonstrated, the word contact has sufficient flexibility to describe the specific operation in dispute of both the plaintiff's and defendants' machines. It is not a limiting factor on plaintiff's invention; rather it is an artificial distinction between the two ravioli machines.

The court has considered the evidence with respect to the several devices relied upon as anticipating plaintiff's machine. In the essentials the devices are dissimilar from that described in claim 4 which the court has found valid.

The evidence is clear and convincing that the so-called Bianchi machine, used by defendant Marlo Packing Corporation, violates said claim; accordingly the defendants are enjoined from further infringing plaintiff's patent.

With respect to damages: Plaintiff has failed to produce evidence of any alleged damage. The court in the light of the instant record is not prepared to allow damages or loss of profit. (*Garretson v. Clark*, 111 U. S. 120.)

Findings of fact and conclusions of law may be prepared and decree entered in accordance with the foregoing.

GEORGE B. HARRIS,
United States District Judge.

Dated July 9, 1947.

[Endorsed]: Filed July 9, 1947. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled action having been tried on its merits by the Court without a jury on March 11, 1947, after due consideration, the Court enters the following Findings of Fact and Conclusions of Law, pursuant to Rule 52(a) of the Federal Rules of

Civil Procedure and Rule 5(e) of Rules of Practice, District Court of the United States, Northern District of California:

Findings of Fact

1.

Plaintiff, Arthur E. H. Barili, is the inventor of the subject matter of United States Letters Patent No. 1,844,142 and claim 4 thereof, granted February 9, 1932, for a Stuffed Pastry Machine. [25]

Defendant, Achille Bianchi, has engaged, without authority, in the manufacture and sale of stuffed pastry machines embodying the invention covered by claim 4 of said Letters Patent No. 1,844,142, and particularly in the manufacture and sale of stuffed pastry machines of the type exemplified in Defendants' Exhibit B (photograph of Bianchi machine).

3.

Defendant, Marlo Packing Corporation, a corporation, has engaged, without authority, in the use of stuffed pastry machines embodying the invention covered by claim 4 of said Letters Patent No. 1,844,142, and particularly in the use of stuffed pastry machines of the type exemplified in Defendants' Exhibit B.

4.

Plaintiff produced no evidence of alleged damage at the time of trial of the case.

Conclusions of Law

1.

The Court has jurisdiction of the subject matter and the parties to this action.

2.

Plaintiff, Arthur E. H. Barili, is the owner of United States Letters Patent No. 1,844,142, granted February 9, 1932, to him for Stuffed Pastry Machine, the inventions disclosed therein, and all rights and privileges under said Letters Patent.

3.

United States Letters Patent No. 1,844,142, and particularly claim 4 thereof, is good and valid in law. [26]

4.

Defendant, Achille Bianchi, has infringed said Letters Patent No. 1,844,142, claim 4 thereof, by manufacturing and selling stuffed pastry machines embodying the invention covered by said Letters Patent, and particularly by manufacturing and selling stuffed pastry machines of the type exemplified in Defendants' Exhibit B, and thereby violated the rights of the plaintiff under said Letters Patent.

5.

Defendant, Marlo Packing Corporation, has infringed said Letters Patent No. 1,844,142, claim 4 thereof, by using stuffed pastry machines embodying the invention covered by said Letters Patent,

and particularly by using stuffed pastry machines of the type exemplified in Defendants' Exhibit B, and thereby violated the right of the plaintiff under said Letters Patent.

6.

No damages or loss of profit are allowed to plaintiff by reason of the infringement of said Letters Patent.

7.

Plaintiff is entitled to a final injunction against further infringement by defendants, Achille Bianchi and Marlo Packing Corporation, a corporation, and each of them, and those controlled by them, and each of them.

8.

Plaintiff is entitled to an assessment of costs against said defendants, Achille Bianchi and Marlo Packing Corporation, a corporation. [27]

GEORGE B. HARRIS,

United States District Judge.

Dated Aug. 1, 1947.

Receipt of a copy of the foregoing Findings of Fact and Conclusions of Law is acknowledged this 21st day of July, 1947.

J. E. TRABUCCO,

Attorney for Defendants.

[Endorsed]: Filed Aug. 1, 1947. [28]

In the United States District Court for the North-
ern District of California, Southern Division
Civil Action No. 26534-H

ARTHUR E. H. BARILI,

Plaintiff,

vs.

ACHILLE BIANCHI, et al.,

Defendants.

FINAL JUDGMENT

The above entitled action having come on to be heard before the Court for final hearing, upon the testimony of witnesses heard in open court, and Findings of Fact and Conclusions of Law having been filed, and the Court being fully advised in the premises, it is

Ordered, Adjudged and Decreed as follows:

1.

Plaintiff, Arthur E. H. Barili, is the owner of United States Letters Patent No. 1,844,142, granted February 9, 1932, to him for Stuffed Pastry Machine, the invention disclosed therein, and of all the rights and privileges under said Letters Patent.

2.

United States Letters Patent No. 1,844,142, and particularly claim 4 thereof, is good and valid in law.

3.

Defendant, Achille Bianchi, has infringed said Letters Patent No. 1,844,142, claim 4 thereof, by manufacturing and selling stuffed pastry machines embodying the invention covered by said Letters Patent, and particularly by manufacturing and selling stuffed pastry machines of the type exemplified in Defendants' Exhibit B, and thereby violated the rights of the plaintiff under said Letters Patent.

4.

Defendant, Marlo Packing Corporation, a corporation, has infringed said Letters Patent No. 1,844,142, claim 4 thereof, by using stuffed pastry machines embodying the invention covered by said Letters Patent, and particularly by using stuffed pastry machines of the type exemplified in Defendants' Exhibit B, and thereby violated the rights of the plaintiff under said Letters Patent.

5.

Plaintiff shall recover no damages or loss of profit from the defendants by reason of their infringement of said Letters Patent.

6.

A final injunction may issue forthwith against further infringement by defendants, Achille Bianchi and Marlo Packing Corporation, a corporation, and each of them and those controlled by them and each of them.

7.

Plaintiff may recover his costs of this suit in the amount of \$57.67.

Dated: Aug. 1, 1947.

GEORGE B. HARRIS,
United States District Judge.

Approved as to form as provided in Rule 5 (d):

J. E. TRABUCCO.

Attorney for Defendants.

Receipt of a copy of the foregoing Final Judgment is acknowledged this 21st day of July, 1947.

J. E. TRABUCCO,

[Endorsed]: Filed and entered August 1, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Achille Bianchi and Marlo Packing Corporation, defendants in the above entitled case, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this case by the Honorable George B. Harris on August 1, 1947, holding the patent in suit valid and infringed and from portions of the decision of Said Judge adverse to defendants and from the Findings of Fact, Conclusions of Law, and rulings which were adverse to defendants.

/s/ J. E. TRABUCCO,

Attorney for Defendants.

[Endorsed]: Filed Aug. 18, 1947. [32]

[Title of District Court and Cause.]

COST BOND ON APPEAL

The Fidelity and Casualty Company of New York

No. 1941179

Whereas, Achille Bianchi and Marlo Packing Corporation, defendants herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment nad decree rendered in the above entitled cause on the first day of August, 1947 by the District Court of the United States for the Northern District of California, Southern Division.

Now, therefore, in consideration of the premises, the undersigned, The Fidelity and Casualty Company of New York, a corporation duly organized and existing under the laws of the State of New York and duly organized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Achille Bianchi and Marlo Packing Corporation, appellants, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and no/100ths (\$250.00) Dollars to which amount said The Fidelity and Casualty Company of New York, acknowledges itself justly bound.

And, further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled

matter may, upon notice to the Fidelity and Casualty Company of New York, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefore against it and award execution therefore.

Signed, sealed and dated this seventh day of August, 1947.

[Seal]

THE FIDELITY AND
CASUALTY COMPANY
OF NEW YORK,

By /s/ CARROLL R. YOUNG,
Attorney.

State of California,
City and County of San Francisco—ss.

On this 7th day of August in the year One Thousand Nine Hundred and Forty-seven, before me, Walter E. McGuire, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Carroll R. Young, known to me to be the Attorney of The Fidelity and Casualty Company of New York, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the County of San Francisco, the day and year in this certificate first above written.

[Seal] WALTER E. McGUIRE,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Jan. 3, 1951.

[Endorsed]: Filed August 18, 1947. [33]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON

Now come the defendants, Achille Bianchi and Marlo Packing Corporation, by their attorney, and having filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Final Judgment heretofore entered in the above entitled case by the District Court on or about August 1, 1947, finding in favor of plaintiff, and state that upon their appeal they will rely upon the following points:

1. That the Court erred in holding claim 4 of Letters Patent No. 1,844,142 is good and valid in law. (Conclusions of Law No. 3.)

2. That the Court erred in not granting a decree holding claim 4 of said patent invalid and void.

3. That the Court erred in holding defendants infringed claim 4 of said patent. (Conclusions of Law Nos. 4 and 5.)

4. That the Court erred in not holding that claim 4 of said patent was anticipated by the prior art.

5. That the Court erred in not holding said claim 4 to be invalid because of its failure to set forth the structure shown and described in the patent drawings and specification.

6. That the Court erred in not holding the patent in suit is a secondary or improvement patent and therefore susceptible of but a narrow construction.

7. That the Court erred in not holding that said claim 4 is susceptible of but a narrow construction in view of the file wrapper limitations.

8. That the Court erred in not dismissing the complaint.

9. That the Court erred in awarding costs of suit to plaintiff.

10. That the Court erred in granting plaintiff an injunction against defendants as prayed in the complaint.

ACHILLE BIANCHI and
MARLO PACKING
CORPORATION,

By /s/ J. E. TRABUCCO,
Their Attorney.

[Endorsed]: Filed Aug. 19, 1947. [35]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the United States District Court for the Southern Division in the Northern District of California:

You are hereby requested to certify as the combined record on appeal in the above entitled case in the United States Circuit Court of Appeals for the Ninth Circuit for use in the the appeal, the following material:

1. The complaint.

2. Answer of defendants Achille Bianchi and Marlo Packing Corporation.

3. Interrogatories of defendants Achille Bianchi and Marlo Packing Corporation.

4. Answers to interrogatories.

5. Memorandum Opinion of Judge George B. Harris dated July 9, 1947.

6. Findings of fact and conclusions of law (August 1, 1947). [36]

7. Final judgment (August 1, 1947).

8. Defendants' exhibits:

A. Pamphlet illustrating pastry forming machine printed in Italy (Physical exhibit).

B. Photographs of Bianchi machine (Physical exhibit).

C. Certified copy of the file wrapper and contents of Barili Patent No. 1,844,142 (Physical exhibit).

D. Printed copy of Holmes Patent No. 518,454.

E. Printed copy of Evans Patent No. 1,094,320.

F. Printed copy of Oleri Patent No. 1,479,925.

G. Printed copy of Tommasini Patent No. 1,236,998.

9. Plaintiff's exhibits:

Printed copy of Barili Patent No. 1,844,142.

(The exhibits above designated as physical exhibits are not to be bound with the record but are to be transmitted as physical exhibits)

10. Transcript of the evidence and proceedings before Judge George B. Harris on March 11, 1947, omitting from page 2 lines 3 to 25 inclusive; omit-

ting from page 3, lines 1 to 9 inclusive, and also omitting from page 3, lines 16 to 25 inclusive; omitting entire page 4; omitting from page 7, lines 4 to 25 inclusive; omitting pages 8 to 25 inclusive; omitting from page 26, lines 1 to 4 inclusive; omitting from page 27, lines 2 to 25 inclusive; omitting pages 28 and 29; omitting from page 30, lines 1 and 2; omitting from page 34, lines 18 to 25 inclusive; omitting page 35; omitting from page 36, lines 2 to 8 inclusive and lines 13 to 17 inclusive; omitting from page 37, lines 1 to 6 inclusive; omitting pages 39, 40, 41, 42, 43, 44, 45, 46, 47 and 48; omitting from page 49, lines 1 to 12 inclusive; omitting from page 52, lines 11 to 25 inclusive; omitting page 53; omitting from page 54, lines 1 to 23 inclusive; omitting from page 57, lines 18 to 25 inclusive; omitting pages 58, 59, 60, 61 and 62; omitting from [37] page 63, lines 1 to 10 inclusive; omitting from page 79, lines 10 to 25 inclusive; and omitting pages 80 to 117 inclusive.

11. Notice of appeal.
12. Statement of Points relied upon.
13. Cost Bond on Appeal.
14. This Designation of Contents of Record on Appeal.
15. Clerk's certificate.

/s/ J. E. TRABUCCO,
Attorney for Defendants.

[Endorsed]: Filed Aug. 19, 1947. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Arthur E. H. Barili, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about August 1, 1947, for failure of said judgment to order an accounting of damages by defendants to plaintiff and for failure to award a reasonable attorney's fee to the plaintiff herein.

/s/ ALAN FRANKLIN,
Attorney for Appellant,
Arthur E. H. Barili.

[Endorsed]: Filed Aug. 29, 1947. [39]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Plaintiff, Arthur E. H. Barili, now files the following Statement of Points asserted as errors and intended to be urged in the prosecution of his appeal from the Final Judgment entered herein on or about August 1, 1947, and asserts that the trial court erred in each of the following respects:

1. In ordering the case to trial the day after setting aside a former judgment in favor of the defendants rendered on a former trial, of which plaintiff received no notice from the Clerk of Court, and

thereby depriving plaintiff of sufficient time to secure evidence of his damages sustained by plaintiff, by reason of the defendants' infringement of the plaintiff's patent in suit.

2. In not ordering an accounting of damages by the defendants to the plaintiff for defendants' infringement of the [40] plaintiff's patent in suit.

3. In not awarding the plaintiff a reasonable attorney's fee in accordance with the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U.S.C., title 35, sec. 70), in view of the defendants' wilful infringement of the plaintiff's patent.

Wherefore, the plaintiff prays that the Final Judgment entered herein, on or about August 1, 1947, by the District Court, be modified, by ordering an accounting of damages by the defendants to the plaintiff for infringement of the plaintiff's patent, and by awarding a reasonable attorney's fee to the plaintiff.

/s/ ALAN FRANKLIN,
Attorney for Plaintiff.

Receipt of a copy of the within Statement of Points is acknowledged this 28th day of August, 1947.

/s/ J. E. TRABUCCO,
Attorney for Defendants.

[Endorsed]: Filed Aug. 29, 1947. [41]

[Title of District Court and Cause.]

PLAINTIFF'S DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the District Court of the United
States for the Northern District of California,
Southern Division:

Please include in the transcript of the record in
this cause, to be filed in the office of the Clerk of the
United States Circuit Court of Appeals for the
Ninth Circuit pursuant to the appeal to said Court,
the following:

1. Reporter's Transcript of the evidence at the
trial of the case on March 11, 1947, page 2, lines 3 to
17 inclusive; page 3, lines 16 to 25, inclusive; page 4;
page 7, lines 4 to 7 inclusive; page 8, lines 21 to 25
inclusive; page 9, lines 1 to 3 inclusive; page 10,
lines 8 to 12 inclusive; page 11, lines 14 to 19 inclu-
sive, line 24, only the word "1." and line 25; page
12, lines 1 to 14, inclusive, and lines 24 and 25; page
13, lines 1 to 11, inclusive, and lines 15 to 25 inclu-
sive; page 14; [42] pages 15 to 19 inclusive; page 20,
lines 1 to 13 inclusive; pages 21 to 25 inclusive; page
26, lines 1 to 4 inclusive; page 27, lines 2 to 25 inclu-
sive; pages 28 and 29; page 30, lines 1 and 2; page
34, lines 18 to 25 inclusive; page 35; page 36, lines
2 to 8 inclusive; pages 39, 40, 41, 42, 43, 44, 45, 46,
47 and 48; page 49, lines 1 to 9 inclusive; page 52,
lines 11 to 25 inclusive; page 53; page 54, 1 to 13
inclusive; page 57, lines 18 to 25 inclusive; pages 58
and 59; page 60, lines 1 to 15; page 61, lines 1 to 12

inclusive, and lines 19 to 25 inclusive; page 62; page 63, line 4.

2. Notice to set for trial, dated November 25, 1946.

3. Reporter's Transcript of argument on setting for trial, dated December 2, 1947, pages 1 and 2 (including line showing appearing counsel).

4. Notice setting case for trial, dated December 3, 1946.

5. Final Decree, dated February 7, 1947.

6. Motion for Relief From Judgment and to Reset for Trial dated February 13, 1947.

7. Affidavits of W. Bruce Beckley and Alan Franklin, dated February 13, 1947 supporting said motion.

8. Reporter's Transcript of argument on Motion for Relief from Judgment and to Reset for Trial, dated March 10, 1947, pages 1 to 6, inclusive (including lines showing appearing counsel).

9. Minute Order entered March 10, 1947.

10. Plaintiff's Exhibit 3, For Identification, (Circular issued by Riviera Packing Company).

11. Plaintiff's Notice of Appeal.

12. Plaintiff's Statement of Points.

13. This Designation of Contents of Record on Appeal.

Dated: September 8, 1947.

/s/ ALAN FRANKLIN,
BOYKEN, MOHLER &
BECKLEY,

/s/ W. BRUCE BECKLEY,
Attorneys for Plaintiff.

Receipt of a copy of the above acknowledged this 8th day of September, 1947.

/s/ J. E. TRABUCCO,
Attorney for Defendant.

[Endorsed]: Filed Sept. 8, 1947. [44]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the appellants herein may have to and including November 6, 1947, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 26, 1947.

GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed Sept. 26, 1947.

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 45 pages, numbered from 1 to 45, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Arthur E. H. Barili, plaintiff vs. Achille Bianchi, Marlo Packing Corporation, a corporation, defendants, No. 26534 H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$10.00 and that the said amount has been paid to me by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 22d day of October, A. D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California

Before: Hon. George B. Harris,
Judge.

Civil Action No. 26534-H

ARTHUR E. H. BARILI,

Plaintiff

vs.

ACHILLE BIANCHI, MARLO PACKING CORPORATION, a corporation, SUPERBA PACKING CO., LTD., a corporation, and PETE MEDA, doing business as MEDA BROS.,

Defendants.

MOTION TO SET TRIAL DATE

December 2, 1946

Counsel Appearing:

For Defendant Superba Packing Co.: James Naylor, Esq.

The Clerk: Barili versus Bianchi, to be set for trial.

Mr. Naylor: If the Court please, I represent one of the several defendants, namely, Superba Packing Company, and Mr. Eugene Trabucco represents the defendants Marlo Packing Company and Bianchi. I have been asked by Mr. Bianchi to speak for him

this morning as to a trial date, and speaking for those three defendants, any date in January or thereafter, to suit the court's convenience, will be satisfactory.

The Court: What is the nature of this cause?

Mr. Naylor: It is a patent case.

The Court: How many other defendants are there other than the three you speak of?

Mr. Naylor: There is one other defendant.

The Court: Resident or non-resident?

Mr. Naylor: Non-resident: Meda Packing Company.

The Court: Who appears for that packing company?

Mr. Naylor: I think Robert A. Zarick of Sacramento. I am not familiar with the gentleman at all. I do not know whether he has even filed a pleading yet.

The Court: Have you a date in January?

The Clerk: January is fairly crowded.

The Court: February?

Mr. Naylor: I should think two days would be adequate for the case.

The Court: What is the underlying issue in the case?

Mr. Naylor: Patent infringement.

The Court: What is the nature of the patent?

Mr. Naylor: A ravioli-making machine. It is not a very complicated structure and it should not take long to present to the court.

The Clerk: February 6?

The Court: February 6. So ordered.

[Title of District Court and Cause.]

MOTION FOR RELIEF FROM JUDGMENT

March 10, 1947

Counsel Appearing:

For Plaintiff: Alan Franklin, Esq., W. Bruce Beckley, Esq.

For Defendants: J. E. Trabucco, Esq.

The Clerk: Barili vs. Bianchi.

Mr. Franklin: Your Honor, this is a motion for relief from a judgment that was rendered against the plaintiff without notice to the plaintiff. I have presented an affidavit that I had never received any notice that the case had been set for trial. Mr. Beckley has an affidavit showing that the clerk admitted that he did not send out the notice. So the plaintiff has not had his day in court. To render a judgment against a party without knowing anything about it, without notice, is not due process of law, and plaintiff's constitutional rights have been seriously violated. I do not accuse anyone of intentionally bringing this about. I think it was one of those things that slipped by without being noticed. So I think the judgment should be set aside. The judgment is irregular in another respect. It was taken as a default, and the Federal Rules do not provide for a default in a case like this. You only take a default on a claim for affirmative relief. The defendant filed no claim for affirmative relief in this case. There was no counterclaim filed. So the judgment is irregular, anyway.

I think in view of the facts of the case the judgment should be vacated and set aside, and a new trial granted. I have some authorities here that Mr. Beckley just gave me. One is *Jerkins vs. Single*, 165 Cal. 747, 748. Another one, *United States vs. Mutual Construction Corporation*, 3 Fed. Rules Decisions, 227, District Court of the Eastern District of Pennsylvania, January 11, 1943. Another case is *Huntington Cab Company vs. American Fidelity & Casualty Company*, 4 Fed. Rules Decisions, 496, District Court, Southern District of West Virginia, September 19, 1945. These are cases holding that the judgments should be set aside in view of the facts of the cases, which are very similar to this one.

Mr. Trabucco: If your Honor please, at this time I wish to state that we have no particular objection to the setting aside of this judgment, providing the plaintiff furnish a security bond insuring the defendants, in the event they are successful, their attorneys fees and costs. The defendants have been put to considerable trouble in this matter, and the negligence of the plaintiff has caused them several hundreds of dollars, and it seems no more than fair that a security bond should be deposited in favor of the defendants, jointly and severally, in the event of their success in the trial of the suit. Of course, the court has the discretion to require such a bond. The authorities are ample supporting this view. There is the case of *Clune vs. Sullivan*, 56 California.

The Court: Is that cited in your memorandum?

Mr. Trabucco: No, it is not, your Honor.

The Court: What is the citation?

Mr. Trabucco: *Clune vs. Sullivan*, 56 Cal. 249.

The Court: Counsel on the other side, as I recall the moving papers, take the position that in a case of this character, having in mind the very nature of the case, there is no provision made for security of costs, nor would it be proper for this court to grant such an application on your part.

Mr. Trabucco: It is common practice in this court to permit a non-resident plaintiff, or to require a non-resident plaintiff to supply a cost bond.

The Court: I glanced at the file very casually, and my recollection is that three or four cases were cited by the other side, is that correct?

Mr. Trabucco: Yes. I have cited several cases, your Honor. The plaintiff in this case is from Los Angeles. He is not in the jurisdiction of this particular court. His property is not in this jurisdiction, and it would be impossible legally to collect the judgment if we obtain one. So it is no more than fair, in view of the trouble the defendants have been put to, and the additional cost of this matter, that he furnish a bond securing the defendants and their attorneys fees and costs in the event they are successful.

The other part of this motion, your Honor, is the setting of the case for trial. We would like an early trial if possible.

The Court: Counsel, Mr. Trabucco, do you recall the day the matter was argued in connection with the taking of depositions?

Mr. Trabucco: Yes, your Honor.

The Court: Reference was then made between yourself and opposing counsel with respect to the date of trial.

Mr. Trabucco: Yes, your Honor.

The Court: The actual trial date was discussed in open court.

Mr. Trabucco: Yes.

The Court: And I distinctly recalled that the actual trial date was discussed. In the very nature of things, this court would not have gone to trial, but for that fact, which I definitely recalled. The circumstance that notice may not have been sent out is, of course, one that I am going to consider, but I recall when you came into court, Mr. Trabucco, on that occasion, and there was no opposition, that I then reminded you that opposing counsel did have actual information concerning the trial. The matter was discussed, not once, but two or three times, because both counsel were very eager that this court get out a decision on the question involved in the disposition, and I did so promptly. So when counsel, Mr. Franklin, speaks of due process and all these other fundamentals that courts necessarily have to consider, I am inclined to recall that circumstance, that we did discuss the trial date in court. Am I correct, sir?

Mr. Beckley: May I make a statement in respect to that, your Honor? I argued that motion at the time the trial date was set. Our office was handling this matter for Mr. Franklin, and we are not attorneys of record. As a consequence, when the trial date was discussed that morning, I at that time did

not have knowledge that Mr. Franklin was not aware that the trial date had been set.

The Court: I do not follow you. There is a negative in there.

Mr. Beckley: I do not know at the time the matter of the trial date came up that Mr. Franklin was not aware that a trial date had been set. As a consequence, since it came up as an incident in the course of our argument on the interrogatories, it did not occur to me that I was receiving information which would be valuable to him, and as a consequence I took no pains, whatsoever, after that to point out to him that a trial date had been set in court, and did not realize that he was unaware of it.

The Court: I want the record to show that Mr. Trabucco did not undertake to impose either upon the court or upon counsel in proceeding as he did proceed, and certainly no criticism can be directed toward him or toward the clerk of the court. I believe that all litigants should have their day in court. We all do. We still have a trial in accordance with the rules. Mr. Trabucco is not opposing that motion.

Tuesday, March 11, 1947

The Court: Barili vs. Bianchi.

You may proceed, gentlemen, in this case.

Mr. Trabucco: I would like to offer a stipulation at this time as to the use of printed copies of patents, rather than certified copies. Mr. Franklin stipulated to that effect by letter already. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Franklin: That is agreeable.

The Court: That may be the order.

Mr. Franklin: If your Honor please, one of the defendants, Pete Mada, doing business as Meda Bros., they are in Sacramento, and in the short time we had to go to trial, we couldn't complete our investigations as to the infringement there. They denied infringement and we will have to see witnesses in Sacramento before we could proceed against them.

The Court: I am willing, counsel, to hold the matter over so you might pursue any additional matters against that defendant. I see no reason, however, to complain of the shortness of time in this case, because it has been before the court, and I feel actual notice was given. In the matter of giving the formal written notice, in my opinion, was an oversight perhaps on the part of the clerk of the Court. At the same time, I feel you had notice. But I will grant you the time. I am not going to foreclose you.

Mr. Trabucco: I would suggest, your Honor, the plaintiff must have had some information concerning this alleged infringing device in Sacramento. I suggest he put his case on as to that——

Mr. Franklin: We had some information, but that witness is not available at this time, so——

Mr. Trabucco: It is rather important to the defendant. We can't go ahead and commence suit against a defendant, unless [2] you know whether the device he is manufacturing or using in an infringement. You must have had some information.

Mr. Franklin: We did. We can't get hold of that witness, and I am agreeable to dismiss that without prejudice, if that is agreeable to the court.

The Court: Motion granted.

Mr. Franklin: I suppose your Honor is familiar with this machine to a certain extent.

The Court: In a general fashion, yes.

Mr. Franklin: I will offer in evidence a printed copy of the patent in suit as the plaintiff's exhibit.

The Court: It may be received and appropriately marked Plaintiff's Exhibit No. 1.

(The document was received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Franklin: The machine is a patented machine, is a stuffed pastry machine, and particularly useful for making ravioli. It introduces two slabs of dough between two rollers and the filling goes in between the two slabs of dough, and on these rollers there is a mold so they can be pressed and contain the filling, and then they are cut by those rollers into squares, making the ravioli. That is the general description of the machine. It isn't complicated, and I think by a careful reading of the specifications, your Honor won't have any difficulty in understanding it. And they have [3] annular cutters on one of the rollers which cuts the dough in one direction, and axial cutters on another roller which cut the dough in another direction, at right angles to the first cutters, which cut it into squares, and that is the shape of the ravioli. The annular cutters are indicated by the numerals 13 and 14. The axial cutters indicated by 15 and 16. They are on the rollers,

forming rollers, which are indicated, I think, by the numerals 11 and 12, and in one of the rollers there are depressions which form the molds, and I think they are indicated 11-A and 11-B. That generally, is the construction of the patent in suit.

There were some interrogatories and answers to interrogatories. I would like to offer those interrogatories and answers in evidence. Is there any objection?

Mr. Trabucco: The only objection we have to the introduction of the interrogatories and answers into the record at this time is that the drawings shown in the answers are not in accordance with the constructions manufactured by the defendant Bianchi, and unless proof is made that he manufactured a construction such as that shown on the drawings, the plaintiff can't prevail here. So, I would suggest they be introduced for the purpose of identification.

The Court: That may be received for the purpose of identification.

(The documents referred to were marked Plaintiff's Exhibit 2 For Identification.) [4]

ARTHUR E. BARILI

called as a witness on his own behalf; sworn

The Clerk: Q. State your name in full to the court. A. Arthur E. Barili.

Direct Examination

By Mr. Franklin:

Q. You are the plaintiff, Arthur E. Barili, in this suit? A. Yes, sir.

(Testimony of Arthur E. Barili.)

Q. You are the patentee in the Letters Patent in suit, No. 1,844,142? A. I am.

Q. Have you sold or assigned any interest in your patent? A. No.

Q. You are the sole owner of the patent?

A. Yes.

Q. Will you state briefly the advantages of your machine over other machines known at the time you invented your ravioli machine?

A. Yes. The way they used to make ravioli before the most advanced method was to produce the two sheets of dough to the proper thickness, lay them on a table, fill it by hand, and one of the sheets—and then cover with another sheet, and then either run the roller, the cutting rollers over those sheets, or run the board with the sheet on under the rollers.

Q. How were ravioli made before you produced your machine? [5]

A. Just the way I explained.

Q. What that by hand? A. Yes.

Q. Did you know of any machine that produced ravioli prior to your machine?

A. There was one made in Italy, and I don't remember if it was patented or not, but it was an entirely different construction than the system I used. I invented my machine after that. The way my machine work, it reduces the sheet, roughly sized, reduces the sheet to the proper thickness, and fits them, forms them, and cuts them all automatically without any hand operation.

(Testimony of Arthur E. Barili.)

Q. Is your machine entirely automatic after placing the dough and the filling into the machine?

A. Yes.

Q. Do you know whether that machine in Italy was ever used in the United States? Did you ever see one in this country?

A. Yes.

Q. You say it was of a different construction?

A. Yes, entirely different.

Q. Was it automatic?

A. Well, not entirely, because of the sheet—instead of using two sheets, you use one, and that had to be of the proper thickness, and it made individual ravioli, and it worked in the system of a punch press, and not to lay the dough on. It was of the other—one layer only and fold over.

Q. Was that a different principle of operation?

A. Yes, entirely different.

Q. The defendant, Superba Packing Company, Ltd., one of the defendants in this case, did you see a machine, that ravioli machine that was operated by that company? A. Yes.

Q. Do you know who made that machine?

A. Mr.—

Mr. Trabucco: Just a minute, your Honor. I think the time and the place should be stated. There are a lot of machines in use.

The Court: Will you lay the foundation?

Mr. Franklni: Yes.

Q. About what year was that, Mr. Barili?

A. It was about six months prior to the issue of my patent. The date is on the patent copy.

(Testimony of Arthur E. Barili.)

Q. While your patent was pending?

A. Yes.

Mr. Trabucco: I also object, your Honor, to any testimony in this matter which is within the statute of limitations, October 6, 1940. Any evidence concerning machines made prior to that time should not be introduced in this——

The Court: This conversation as between the Superba Packing Company and this company occurred when?

Mr. Franklin: I asked him when he saw this particular [7] machine.

The Court: I will allow it. It is a preliminary question.

Mr. Franklin: Q. When was it? You say prior, or while your application was pending? What year, do you remember what year?

A. I think it was in 1932. The date is on that patent copy.

Mr. Franklin: I agree that was more than six years prior to the filing of this suit, but that limitation only goes to the question of damages. It does not go to the question of injunction, and, anyway, the Superba Company has recognized that there was an infringement, and they have consented to judgment without damages.

The Witness: This was before that.

The Court: Before what? 1932?

The Witness: The machine—my attorney— It is not the machine that is in this case. Another machine in this case.

(Testimony of Arthur E. Barili.)

The Court: What has that to do with this case?

Mr. Franklin: Q. Do you know who made that machine? A. Yes, Mr. Bianchi.

Q. One of the defendants in this suit?

A. Yes.

Mr. Franklin: That ties that up. [8]

Q. Did you secure a judgment against the Superba Packing Company for infringement on that Bianchi machine? A. Just recently.

Mr. Franklin: Yes. I will offer a certified copy of the judgment in evidence.

Mr. Trabucco: I don't see where that has any bearing on this matter, at all, your Honor. The offer for judgment was made by the attorney for Superba, with the provision that the judgment be taken against Superba, and that the costs incurred by Superba would be paid by the plaintiff, which were apparently paid to them. That has nothing to do with the issues involved in this matter between Marlo, the packing corporation, and Bianchi. That judgment is part of the record here.

The Court: What claimed relationship is there?

Mr. Trabucco: It is not *res adjudicata* as far as these defendants are concerned.

The Court: What is your purpose?

Mr. Franklin: He made a mistake there. That wasn't the judgment I intended to introduce. That is a judgment against the Riviera Company, so I will have to withdraw that particular judgment.

Mr. Trabucco: As far as the judgment against Riviera is concerned, it has no effect on the merits

(Testimony of Arthur E. Barili.)

of this case, either. That was a consent decree, that was entered under duress in [9] that particular case.

The Court: This appears to have been a stipulated decree. This affects the Riviera Packing Company and Giordano, Raymond and Robert.

Mr. Trabucco: That was a consent decree, and that is not *res adjudicata*, your Honor.

The Court: I will sustain the objection.

Q. (Mr. Franklin): On that judgment of the Superba Packing Machine Company, that is a judgment in this case, and it has already been rendered. Do you know what machine that judgment involved?

A. Yes, second machine Mr. Bianchi made for the Packing Company.

The Court: Speak up just a little louder. It is difficult to hear both of you gentlemen. Mr. Trabucco, can you hear this testimony?

Mr. Trabucco: Yes.

Q. (Mr. Franklin): That machine was a Bianchi machine? A. Yes.

Q. Made by the defendant Bianchi in this case?

A. Yes.

Mr. Franklin: Of course, Bianchi is sued individually and sued jointly and severally, and that is a machine that the defendant made, and I don't see why that isn't relevant. Of course, that is a consent decree judgment, but we don't make consent judgments unless there is some ground or reason [10] for it, so I think——

Mr. Trabucco: That settlement, your Honor, was made during the time of the war, and this suit was

(Testimony of Arthur E. Barili.)

commenced against Superba, the Riviera Manufacturing Corporation. They had a Government contract. They were making a great deal of money, and this suit was commenced against them, and they, rather to take chances of being closed down, they settled for \$3500, and certainly the settlement in that matter is not *res adjudicata* here.

The Court: It would not be considered by the court.

Mr. Trabucco: As a matter of fact, this machine was made prior to the six-year period anyway.

Mr. Franklin: That was the Superba machine.

The Court: What is the purpose of your showing with respect to the Superba Packing Company?

Mr. Franklin: That is evidence of infringement. That was admitted in the judgment. It admits infringement, admits the validity of the patent. While it is a consent decree, it is relevant and, you might not say it is conclusive.

The Court: Neither the defendant Bianchi nor the Marlo Packing Company, or both of them were parties to that stipulation, were they, respecting Superba?

Mr. Franklin: Bianchi wasn't a party to that judgment, no. He took no interest in it. He didn't defend the suit. I will therefore offer this judgment against the Riviera Packing [11] Company in evidence. That was ruled out. I will offer it again.

Mr. Trabucco: I still object to that, your Honor. That has nothing to do with the merits of this case. The parties here were not parties to that suit. Fur-

(Testimony of Arthur E. Barili.)

thermore, that was an uncontested matter, a consent decree, and certainly it isn't *res adjudicata* as far as these defendants are concerned, and I don't see how it can prove any of the issues.

The Court: I cannot see how you intend to prove any of the issues in this case.

Mr. Franklin: It is evidence of infringement.

The Court: Affecting other parties not related from point of time or sequence, logically or otherwise. I will sustain the objection.

Mr. Franklin: The time was——

The Court: The foundation is imperfect, and you just can't offer vagrant papers to this court without any logical or legal relevancy.

Mr. Franklin: This was entered October, 1945. That was after the war. That wasn't during the war. So, while I won't say——

The Court: Let's proceed against the defendants Bianchi and Marlo Packing Company, the defendants on trial.

Mr. Franklin: This is evidence of infringement. It is admissible on the ground of——while it may not be *res* [12] *adjudicata*, nevertheless it is evidence of infringement, and that is all I am offering now, evidence of infringement.

Mr. Trabucco: That is no evidence of infringement. Certainly, Marlo had nothing to do with that infringement, at all.

Mr. Franklin: Marlo didn't but Bianchi did. Bianchi made this machine.

Mr. Trabucco: It certainly isn't *res adjudicata*. He had no knowledge, whatsoever, of this suit. He

(Testimony of Arthur E. Barili.)

didn't have any chance to examine the proceedings, nor make his investigation as to infringement or anything else in connection with it.

The Court: The objection is sustained.

Mr. Franklin: The information is he did have knowledge of it and refused to cooperate—

The Court: I have sustained the objection.

Q. (Mr. Franklin): I have a circular here. I will hand you a circular here, and will you state what that is, Mr. Barili?

A. This is a circular describing the productions of ravioli of the Riviera Packing Company. It shows parts of the process, and includes descriptions of their ravioli machine made by Bianchi.

Q. Is there an illustration there of the Bianchi machine?

A. Yes, there is a photograph here.

Q. Will you point that out to the court?

The Court: What is this, counsel? [13]

Mr. Franklin: The Riviera Packing Company circular, with the Bianchi machine they use.

The Witness: The description of the machine, how it works. Describes how the machine performs.

Q. (Mr. Franklin): Is that the machine which was involved in that suit against the Riviera Packing Company? A. Yes.

Q. Did you meet those workmen whose pictures appear? A. Yes.

Q. Did you have a conversation with them?

A. Yes, they were down at my factory, to check up on my machine.

(Testimony of Arthur E. Barili.)

Mr. Trabucco: That is objected to as hearsay.

The Court: Sustained.

Q. (Mr. Franklin): Did they tell you they operated that machine? A. Yes.

Mr. Trabucco: Objected to as hearsay.

The Court: Sustained.

Q. (Mr. Franklin): Do you recognize that as a Bianchi machine? A. Yes.

Mr. Trabucco: Just a minute, your Honor. The interrogatories in this matter state that the first indication that he ever had of the Bianchi machine was in 1946, I believe it was. [14]

The Court: Interrogatory No. 1 or 2, as I recall.

Mr. Trabucco: Yes. He states he is familiar with this machine which apparently was made prior to 1940. He also states that he had first knowledge of Bianchi's activities in 1932. I can't quite understand how the witness can testify.

The Court: You might cross-examine him on that subject, counsel.

Mr. Trabucco: All right.

Q. (Mr. Franklin): The machine that Superba was using, that small machine, did you see that machine?

A. I only seen the rollers of that machine, the castings. As Mr. Bianchi told me, it was an experimental machine, and I later found out that there was a plate in the machine over here, saying this is the model of the machine—no, model of the Superba Packing Company machine made by Bianchi.

(Testimony of Arthur E. Barili.)

Mr. Trabucco: That testimony is hearsay.

The Court: It is hearsay.

Q. (Mr. Franklin): Did you discuss these rollers with Mr. Bianchi personally, himself?

A. Yes.

The Court: When? Let's have the time, the place, the parties present, so I can have some coordination or degree of coordination with respect to this evidence.

The Witness: It was about within six months prior to [15] the date of that patent.

The Court: Which patent, the one in question?

The Witness: The patent that is involved in this infringement.

The Court: In this alleged infringement?

The Witness: Yes.

The Court: And the date of that is 1932, is it not?

The Witness: Yes, sir.

The Court: The effective date?

The Witness: Yes, sir.

The Court: It was before that that you had a discussion with Bianchi?

The Witness: Yes.

The Court: Six months before?

The Witness: Within six months.

The Court: All right.

Q. (Mr. Franklin): You saw that first machine Superba had in 1932. Did you take any action against Mr. Bianchi at that time?

(Testimony of Arthur E. Barili.)

A. No, we settled. I settled with Superba out of court, and then I went over to Mr. Bianchi and he says—I didn't go over there with the intention of collecting anything. He says, "Don't you come over here and try to collect, because you only collect on one side." I says, "That's all right." He says, "I am not going to make any more of those machines, anyway." [16] He says in effect, "I have the experimental machine here, two rollers, same diameter as the machine over at Superba, only shorter." Made in the same manner. And he says, "if you want them, you can have them." And I told him no, because I used smaller size than that, in diameter. So that's the way it was left. Later, I found out that they were using this machine at the World's Fair.

Q. This machine used at the World's Fair, was that the same machine that you saw first, or was that a different machine?

A. The same machine Bianchi show me in the shop. It wasn't a complete machine, but assembled in such a manner, good enough to experiment, to find out if it works good enough, so he can make a larger roller, to make the machine for Superba Packing Company.

Q. Was that a small machine? A. Yes.

Q. That wasn't the actual machine that Superba had?

A. No, not at that time. That was another machine.

Q. He promised not to use that?

A. Yes.

(Testimony of Arthur E. Barili.)

Q. Then later did you discover whether he had used it, or not, after that?

A. Just drolled it up and plate it and use it over here at the Fair.

Q. When did you learn of that? [17]

A. During the World's Fair.

The Court: The date?

The Witness: That I don't know. It was in the World's Fair sometime.

Mr. Franklin: Will you describe how the rollers were constructed?

A. Exactly the same as——

Mr. Trabucco: I object, your Honor, he is going into the construction of this machine which was apparently made in the Thirties and used in 1939, and never in possession of Bianchi or Marlo since 1936, I think it is, so I can't see how this evidence is relevant at all.

Mr. Franklin: It is a basis for an injunction, your Honor, and we have an injunction against Superba Company.

Mr. Trabucco: There can't be an injunction unless there is infringement, and there certainly isn't an infringement in this case, especially since the statute of limitations has taken effect.

Mr. Franklin: The statute of limitation only relates to damages. It doesn't relate to injunction, making that machine.

The Court: I will allow it, counsel. I will allow the question.

Mr. Franklin: Very well.

(Testimony of Arthur E. Barili.)

Q. Describe the construction of the rollers, Mr. Barili.

A. Two rollers. On one roller there is a series of molds all [18] the way around the rollers and extra cutters. And also on the other roller with annular cutter. That is the two rollers.

Q. Yes.

A. And a hopper to feed the dough between the two sheets of paste—I mean to put the filling into the two sheets of paste, and had means—In other words, two sets of roller on each side to reduce and feed the sheets of dough right on the hopper over the forming and cutting rollers.

Q. When you speak of axial cutters, what do you mean? A. Longitudinal.

Q. The axis of the roller? A. Longitudinal.

Q. Annularly around the roller?

A. That's right.

Q. Did it have a hopper? A. Yes.

Q. Was there a weight in the hopper?

A. Which machine?

The Court: For feeding?

The Witness: On which machine?

Q. (Mr. Franklin): The Superba.

A. Pushing it down with 2x4 by hand occasionally.

Q. Was there any way of adjusting the hopper up or down on that machine?

A. Yes, kind of holes, so they can raise it or lower it. [19]

(Testimony of Arthur E. Barili.)

Q. That drawing which was in the interrogatories—

The Court: That is your drawing?

Mr. Franklin: The drawing we furnished.

Q. Is that a drawing of the Superba machine?

A. Yes, sir.

Q. Is that correct, to the best of your ability?

A. It shows the principle as much as I could put it on paper. Of course, it might be a difference in the looks of it as far as the guards or something like that, but that won't change the element. The element is the same. In other words, the roller might be a little higher or lower, different angle than what it was there, but the same purpose, more or less, the same principle.

Mr. Franklin: I will not continue with Mr. Barili now. I may wish to recall him.

The Court: We will take a short recess, gentlemen.

(Recess.)

Mr. Franklin: If your Honor please, Mr. Trabucco agreed to defer cross-examination of Mr. Barili at this time, so that we can put on a witness we subpoenaed who is superintendent for the Marlo Packing Company. He would like to get back to his business.

The Court: You may withdraw the witness. [20]

HERBERT GIERTH

called as a witness on behalf of plaintiff; sworn

The Clerk: State your name to the court.

A. Herbert Gierth.

Direct Examination

By Mr. Franklin:

Q. What is your occupation, Mr. Gierth?

A. I am superintendent of the Marlo Packing Company.

Q. The Marlo Packing Company, one of the defendants in this suit? A. Yes.

Q. On about July 11, 1946, did you have a conversation with Mr. Arthur Barili, the plaintiff in this suit?

A. Yes. About this time, he came to our place to sell a machine, ravioli machine.

Q. Came to the Marlo Packing Company?

A. Yes.

Q. Do you remember what the conversation was?

A. He spoke in general about new patents and new ideas in the manufacture of ravioli. Outside that old type of machine I had seen years ago, I didn't learn anything new. So, when Mr. Barili left, we had a machine, and I told him we had used years ago—Bianchi's ravioli machine.

Q. Did you state that you had just bought a new machine from Bianchi? A. No.

Mr. Trabucco: If the Court please, I have these photographs [21] of that machine. If it would help you in any way to conduct this testimony, I will be glad to let you have them.

(Testimony of Herbert Gierth)

Mr. Franklin: I would like to look at them.

Q. Did you tell Mr. Barili that you had bought a machine from Bianchi that was just like Mr. Barili's machine, only twice as wide?

A. No, not at that time. There was no occasion of saying that. In fact, I didn't know this.

Q. Did you state you had thought one machine four or five years ago like Mr. Barili's machine, only twice as wide?

A. I told him we bought this ravioli machine from Mr. Bianchi shortly before the war broke out. This machine probably has been in use about half a year prior to the outbreak of the war, and then we discontinued it, because we are going into Army and Navy contracts, and has not been used since that time, and still is not in operation today.

Q. Do you know the construction of that machine?

A. Very familiar with it.

Q. How are the rollers constructed?

A. One roll has all the molds and the molding and impression, and the other roll has the cutters, cross and lengthwise.

Q. Lengthwise and crosswise?

A. Crosswise.

Q. Do you remember whether the Bianchi machine, whether there was some difficulty about the scrapers on it? [22]

The Court: About what?

Mr. Franklin: Scraper.

(Testimony of Herbert Gierth)

The Witness: There weren't any scrapers on it, as far as I remember.

Q. (Mr. Franklin): Do you remember sending that machine back to Bianchi's shop?

A. It was necessary, yes, because the machine stood in this place for about three years in steam and water, and in an idle condition. It had to be brought back and readjusted and cleaned up, polished up.

Q. There was nothing wrong with the scraper?

A. Nothing wrong with the scrapers. Nothing wrong with the machine, at all, outside it needed cleaning.

Q. Just to clean it? A. Yes.

Mr. Franklin. That will be all. You may cross-examine.

Mr. Trabucco: No questions.

(Witness excused.)

ARTHUR E. BARILI

recalled.

Direct Examination

(Resumed)

By Mr. Franklin:

Q. Mr. Barili, do you recall a conversation in the summer of 1946 with Mr. Gierth?

A. I do.

Q. Will you state what the conversation was?

(Testimony of Arthur E. Barili)

A. Well, talking about this machine, here, and he said, he suggested to call up Marlo Packing Company. He said, "They are expanding. Maybe they need some more machines." And I remember I sold them a machine before that. So I called them up and asked for Mr. Ansra. He was the only person I knew there, and he was out, so they got Mr. Gierth on the phone.

The Court: Who?

The Witness: The witness here, Gierth.

The Court: The last witness?

The Witness: And I told him who I was, and that I sold them a machine a long time ago, and I heard he was expanding his business. I asked him if he was in need of more machinery of that kind, and he says no. He says, "We don't need no machinery for ravioli," he says. "We had one made," he says, "just exactly like yours, and twice as wide." I says, "Where did you get that, made by Bianchi?" He says, "Yes." So, I says, "Well, I come down to see you anyway." I went down there two days after. Mr. Ansara was there in the office and he come up, and Mr. Ansara, he says, "What is wrong with you? You make a machine for 25 years. You never improve on it." He says, "Can't you make a machine that does the whole thing, mix the dough," and this and that. I says, "It can be made."

Q. (Mr. Franklin): Mr. Barili, talk a little louder.

(Testimony of Arthur E. Barili)

The Court: Half of this, I am satisfied, the reporter is not getting. I can't hear it. You drop your voice. If you [24] keep your voice up I will hear the testimony. I have asked you three times.

The Witness: He says, "Who owns this patent, anyway, who owns the patent of the machine?" He says, "Bianchi, Mr. Bianchi claimed he owned it, and you claim you own it." I says, "It is my patent, and besides that, you know I own the patent, because the number of the patent is cast on the frame of the machine I sold you." Then I asked Mr. Gierth, I says, "Where is the machine anyway? He says, "It is down at Mr. Bianchi's shop." I says, "What is the reason?" "Well," he says, "We haven't been using it for quite a while," he says, "five or six months." He says, "My trouble is with those scrapers," he says, "and that is all." Then we got into talking about making something else for it which he would figure on it. Wrote to them about it and never heard from them.

Q. (My Franklin): Was that all the conversation?

A. Yes, except something that perhaps don't pertain to this case. Just about new machinery. He was complaining of getting prices on and different times. In other words, another machine with a series of rollers he was interested in. So you put in the dough about as it come out and reduce it all automatically without going through—

Q. You say he said the machine was exactly like yours, only twice as wide? [25]

(Testimony of Arthur E. Barili)

A. He says exactly like mine, only twice as wide.

Mr. Franklin: All right.

The Witness: That is the only reason I wrote to him after that.

Cross-Examination

By Mr. Trabucco:

Q. Did I understand you to say Marlo Packing Corporation had purchased a machine from you?

A. Yes.

Q. When was this:

A. I think it was about 1933 or something like that. I don't recall. Quite a long time ago. In fact, I asked him what they did with it. He said they sold it. Mr. Gierth told me they sold it. Mr. Ansara said they changed it for other equipment.

Q. Where is your place of business?

A. 716 North Broadway, Los Angeles.

Q. What type of business are you engaged in.

A. Manufacturing of ravioli machine, tool and dies, experimental.

Q. You own the plant where your business is located?

A. I own the plant.

Q. Do you own it? A. Yes.

Q. You are the sole owner of it?

A. Yes.

Q. What other products do you make other than ravioli machines? [26]

A. Developing of inventions, tools and dies.

Q. In your answers to the interrogatories, you were asked under interrogatory No. 1:

(Testimony of Arthur E. Barili)

“State when plaintiff first learned of the alleged infringement by defendant Achille Bianchi of the patent in suit?”

Your answer to that interrogatory was: “About July 15, 1946.” How do you reconcile that sworn statement to the testimony you have given in this matter as to having known Bianchi and seen the machine and discussed the machine with him in the early Thirties?

A. I don't get that very clear. I remember when I built the machine, when the Bianchi machine was for the Superba Packing Company. The Marlo machine, I learned about that last July, July a year ago, 1946.

Q. You are familiar with the interrogatory that was asked you at that time, and that is here filed and served on your attorney, aren't you?

A. I think I read it up to me.

The Court: Read it to the witness.

Q. (Mr. Trabucco): “State when plaintiff first learned of the alleged infringement by defendant Achille Bianchi of the patent in suit?” And your answer was: “About July 15, 1946.”

A. Yes, that particular machine, that Marlo Packing machine, [27] that is when I learned about it.

Q. There is no mention here as to the Marlo Packing Company machine, is there? There is no specific reference to that machine in this interrogatory?

(Testimony of Arthur E. Barili)

A. Bianchi. The patent in suit is the particular machine that was made by Bianchi. I didn't know that he made any more machines after I seen those rollers, that he made a machine for the Superba Packing Company, I didn't know anything about it until I come up here. I didn't know he was still infringing, because I offered to pay him commission or get the little license fee, if he can make them. He says, "No, I won't make any more."

Q. As a matter of fact, you knew of the activity of the defendant Bianchi in the manufacture of these machines in the early Thirties, did you not?

A. First started, yes, but he told me he was stopping.

Q. Notwithstanding that knowledge, you didn't commence suit against Bianchi, did you?

A. No suit against the Superba Packing Company.

Q. What prompted you to commence suit at this particular time against defendant Bianchi and the Marlo Packing Corporation?

A. Because I found out he was still making those machines.

Q. You knew about it in the Thirties, did you not?

A. He told me then that he wasn't going to make any more. It was a gentleman's agreement. [28]

Q. Your testimony goes to the knowledge of having seen the machine that was manufactured in 1937, I believe it was, for the Superba Company. If you thought there was an infringement, why didn't

(Testimony of Arthur E. Barili)

you commence suit at that time against Bianchi? Why did you want seven or eight years later to commence suit? A. 1937?

Q. 1939 or whenever it was. 1939, I believe it was. Why did you wait seven years to commence suit?

A. I assume on this machine, here, the Superba Packing Company already settled with them—with him, I assume, because I found out he made the machine for Marlo Packing Company, this machine, here, for the purpose of injunction, this little machine is made for the Superba Packing Company.

Q. Do you know when this machine was made?

A. Which one?

Q. For the Marlo Packing Corporation.

A. Mr. Gierth told me.

Q. When?

A. Last year when I talked to him. He says, "We have a machine made between—little over five years ago," and he says, "We haven't used it for about six months.

Q. As a matter of fact, that machine was manufactured in 1939, was it not?

A. I don't know. The last year, 1946, he says, "We have [29] this machine here for about five years," and he says, "We haven't been using it for six months now."

Q. When did you first learn of the use by Marlo Packing Corporation of this machine?

A. July 15, last year, 1946.

(Testimony of Arthur E. Barili)

Q. You saw the machine?

A. I haven't seen that machine, no.

Q. You are not familiar with its construction?

A. No. He told me—Mr. Gierth told me exactly the same as the one sold to them.

Q. You do not know whether it infringes this patent, or it, if not having seen it? A He told me that, "I am sure it is exactly like mine," so it is an infringement.

Q. You, of your own knowledge, do not know whether it infringes your patent, do you?

A. Well, the only thing I know about it it infringed my patent is because he told me it is exactly like mine. If it is exactly like mine—

Q. You just examined the photographs of that machine, did you not? Would you say that is exactly like your machine. A. I don't know.

Q. I will show you the photographs of the machine used by Marlo Packing Corporation and ask you if that is the machine which you consider an infringement on your patent.

A. According to what I know, this is not the machine of the [30] Marlo Packing Company, because Mr. Gierth told me the scrapers—he says, "What happened? What happened to those scrapers?"

Q. I am asking you if this machine, if you would consider this an infringement of your patent

A. The general construction is exactly the same, the feeding of the dough, the means of conveying the dough into the center roller is the same. He has

(Testimony of Arthur E. Barili)

a hopper in there. I don't know if he changed this, the same thing, or not. According to this picture here, there might be something to infringe my patent, or there might not.

Q. Which claims, if any, would you consider infringed by this machine?

A. Is this the Marlo Packing machine?

Q. Yes.

A. The Marlo Packing machine?

Q. Yes, the Marlo Packing machine. What claims, if any, do you consider infringed?

A. It isn't very clear to me as to the claims

Mr. Franklin: I think I will object to that question.

The Court: Objection overruled.

Mr. Franklin: You asked the witness whether it infringes a claim. That involves a construction of the claim.

The Court: Which he claims.

The Witness: I am not a patent attorney.

Q. (Mr. Trabucco): You have made the statement that is an [31] infringement of your patent.

A. As he described it to me, yes. He described it to me.

Q. This is the machine that was referred to?

A. Not as you referred to. As you described to me.

Q. Are you in a position to state whether or not it is an infringement of your patent?

A. This? Q. Yes.

A. If it is the machine over there, it has been changed.

(Testimony of Arthur E. Barili)

Q. I am asking you whether that machine is an infringement of your patent

A. I am not a patent attorney.

Q. You commenced a suit here, and you have charged an infringement. You put these defendants to considerable cost.. A. Yes.

Q. You must have some knowledge of whether or not that is an infringement.

A. The attorney of the Superba—I mean of the Marlo Packing Company, come down and told me it was an infringement of the Superba—I mean the Riviera.

The Court: Is that the only basis for the claim, the statement which is apparently hearsay from the attorney for the Riviera Packing Company that there was an infringement here? Is that that the only basis for your claim?

The Witness: Yes. [32]

The Court: The only basis?

The Witness: Yes.

The Court: You are an engineer, are you?

The Witness: Not an engineer, no.

The Court: Are you skilled in engineering matters? The Witness: Yes.

The Court: And the engineering craft?

The Witness: Yes.

The Court: You constructed the original machine, did you?

The Witness: Yes.

The Court: Applied for your basic patent?

The Witness: My attorney.

(Testimony of Arthur E. Barili)

The Court: You prepared the drawing, did you, in question, which is attached to your interrogatory? The Witness: Yes.

The Court: You prepared that drawing?

The Witness: Yes.

The Court: That purports to delineate on its face the construction of the ravioli machines in question which you claim to have been infringed?

The Witness: Yes. The fact that Mr. Gierth told me it was exactly the same as mine, therefore it is exactly the same, because that is a drawing of the Superba Packing Company machine.

Q. (Mr. Trabucco): You heard Mr. Gierth's testimony, did you not, to the effect that in this machine that is now in use, made by Bianchi, the cutters are all on one roller. Your heard that testimony?

A. But he did not say that to me. He said entirely different to me.

Mr. Trabucco: I believe that is all, your Honor.

Mr. Franklin: Just a moment, Mr. Barili.

Redirect Examination

By Mr. Franklin:

Q. You were asked on what you based your opinion that there was an infringement of the patent in suit, and if what some attorney had told you was the only basis of it. You had a conversation with Mr. Gierth? A. Yes.

Q. And I would like to know if you based your opinion of the infringement on the Marlo

(Testimony of Arthur E. Barili)

Packing Company on your conversation with Mr. Gierth? A. Yes.

Q. You learned about the manufacture of the machine for the Superba Company back in 1933, and do I understand you to say that had been settled? A. Yes.

Q. You gave the Superba Company a license to go ahead with that machine, did you not?

A. I did.

Q. You had a conversation with Mr. Bianchi at that time about [34] manufacturing that machine and there was some agreement reached?

A. Yes.

Q. And what was that agreement?

A. The agreement was that he says he wasn't going to make any more, and he had this roller that he used in the Superba, the second Superba machine. He says, "You can have this, because I don't use them." He says, "I am not going to make any more of these machines." So I told him, "Well, I says, "I don't see why you should, provided you get a license from me and you give me a reasonable fee for every machine you build. Otherwise, you can send me the order and I pay you commission." He says, "That is fine." And I told him when I got back to Los Angeles I am going to send you photographs, and I never heard from him since.

Q. When did you learn that Bianchi had built this second machine after that agreement was made, when he promised not to manufacture any more?

(Testimony of Arthur E. Barili)

A. Well, that was about the time of the World's Fair. He had part of it built before that, the rollers, and just put it together and finished it up, embellished—in other words, plate it and put it over to the World's Fair, I think for the Superba.

Q. When did you learn about the use of the machine by Marlo?

A. On or about July 15, 1946.

Mr. Franklin: You may further cross-examine.

Recross-Examination

By Mr. Trabucco:

Q. You say you were the first to manufacture an automatic ravioli machine. Are you correct in that statement? A. That I manufactured?

Q. Yes. You were the first to manufacture a machine of that type, didn't you make that statement a while ago?

A. Of that type, yes.

Q. I will show you a print of a number of automatic ravioli machines which was published prior to the First World War, and ask you on that sheet of paper if you don't see a number of different types of ravioli machines somewhat similar to yours?

The Court: We have reached the noon hour. At the resumption at two o'clock, we will go into the matter extensively. We will take the usual noon recess until two o'clock.

(A recess was taken until two o'clock p.m.)

Afternoon Session
Tuesday, March 11, 1947

ARTHUR E. BARILI

resumed the stand.

Recross-Examination

(Continued)

Mr. Trabucco: Read the last question.

(Last question read by the reporter.)

Mr. Franklin: I would like to see the date of publication on that, if you say it is published prior to the last war.

Mr. Trabucco: There is no date of publication on it, your honor, but we will connect it up through Mr. Bianchi, who secured it in Italy after the last war.

The Court: Subject to that showing you may answer the question.

The Witness: Yes, I seen one, but it wasn't published before the First World War.

The Court: That is a matter of showing on the part of counsel. He stated he would connect it up. Do you see one that resembles it?

The Witness: It doesn't resemble mine.

The Court: Similar to it?

The Witness: No. Yes. The picture of it in itself doesn't resemble mine, but the elements in there are very close to it. In fact, a patent was rejected on this in Italy on account of a patent I had prior to this—the application—and they turned around and patented it in France. [37]

(Testimony of Arthur E. Barili)

The Court: Would you answer counsel's question? That is the answer, I assume.

Q. (Mr. Trabucco): You had in the old machines that were manufactured in Italy in 1915, say, devices which cut the ravioli, sealed the edges, and prevented the interior part of the ravioli from escaping through the sealed edges, is that not true?

A. Yes, but that it was made in 1915.

Q. The statement you previously made to the effect that you were the first to make an automatic ravioli machine is not true?

A. It is true, because this machine here was made after mine.

Mr. Trabucco: That is all.

The Court: You refer now, so the record may be clear to a specific illustration?

Mr. Trabucco: I will introduce this for identification.

The Court: It may be marked for identification.

(The document referred to was marked : Defendants' Exhibit A for Identification.)

Mr. Franklin: I will object to that.

The Court: Objection overruled.

Mr. Franklin: If it is offered for the purpose of invalidating——

The Court: He is showing prior art.

Mr. Franklin: The state of the art. Very well.

Q. (Mr. Trabucco): Did I understand you to say that the drawing which accompany your answers to defendants' interrogatories were made from the small experimental ravioli machine?

(Testimony of Arthur E. Barili)

A. No. It was made from the last machine made by Bianchi over at Superba, the one that is now in actual use.

Q. And it was made from your recollection of that machine, was it? A. Yes.

Q. In your answers to the interrogatories, you stated that was the Marlo machine.

A. Mr. — what is the name? The witness that was over here, he told me it was exactly the same.

The Court: Mr. Gierth?

The Witness: That's right.

Q. (Mr. Trabucco): You were asked in Interrogator No. 7,

“Precisely where in the alleged infringing devices of Achille Bianchi and Marlo Packing Corporation is there found the features set forth as new and patentable in response to paragraph 6 hereof?”

In answer you submitted these drawings. Where does the Marlo Packing Corporation fit into this picture?

A. The Marlo Packing Corporation fits into that because Mr. Gierth told me it was exactly like my machine—my machine I had over there, so that is it. Besides that, it is exactly [39] the same as the one I got, exactly the same as the one with the Superba Packing Company.

Q. The drawings were made from your conversation with Mr. Gierth, is that true, rather than from an inspection of the machine which was in the possession of Marlo Packing corporation?

(Testimony of Arthur E. Barili)

A. Yes, he explained me it was exactly like mine, only twice—larger. And from that information I deducted it is the same thing that I got.

Mr. Trabucco: I think that is all.

Mr. Franklin: Mr. Barili testified concerning a circular that was issued by the Riviera Packing Company. I had intended to offer that in evidence, and I will offer than in evidence. Any objection to that?

Mr. Trabucco: I don't believe the foundation has been laid for that document to be introduced into evidence. It doesn't show when it was printed.

The Court: Is this it?

Mr. Franklin: That is it. I didn't know what had happened to that. I thought it was introduced into evidence.

The Court: I don't know in what manner this will aid the court in deciding the issues in this case. This seems to be a circular emanating from the Riviera Packing Company, I assume, having to do with their organization, showing bottles with the Riviera label thereon; a cut or a photograph showing the rolling of dough, representing the part of a machine. [40] I can't see that it will aid or help the court, counsel, in any fashion. Will you make yourself clear on that? I may be wrong.

Mr. Franklin: Mr. Barili has said that he was familiar with the Bianchi machine and he identified an illustration on there as a Bianchi machine, and that is an illustration of it. Now, I can ask Mr.

(Testimony of Arthur E. Barili)

Barili where he got that from.

Q. Where did that come from, Mr. Barili. How did you get possession of it?

A. We asked for a photograph.

Q. Asked whom?

A. The attorney for the Riviera Packing Company, and the attorney for the Riviera sent out this picture. He says it was the only they they had.

Q. He gave that to you? A. Yes.

The Court: It may be marked for identification. I will sustain the objection to the offer and offer it for identification.

(The circular referred to was marked Plaintiff's Exhibit 3 For Identification.)

Q. (Mr. Franklin): Mr. Barili, you were asked about this circular here that is marked for identification A, that cut which is entitled, "Raviolara." What do you know about that?

A. What I know about that, that I was in correspondence with [41] Mr. Mario Eccher, the name on that circular, the man that issued that circular, a few years before I got my patent. I sent some photographs if he could sell those machines over there. Well, we came to an understanding that he was supposed to pay me a certain sum for the use of my Italian patent. My patent was already issued over there. So, between the time that we were corresponding, something happened, in other words, the panic, the depression, 1932 or 1933. So he says, "We will have to resume these negotiations later,

(Testimony of Arthur E. Barili)

because we couldn't sell anything at present." In the meantime from Milan, Italy, I received a letter from a party trying to negotiate with me on the use of that patent, and he says, "I understand that somebody asked for the drawing of your inventions," and he says, "I don't know for what reason." He says, "I want to know if you applied for a patent in France," because somebody applied for a patent over here, and this machine—and he sent me a picture and he says the patent was rejected, and therefore the patent was applied in France. And the patent, I understand that it was issued on that machine in France after my patent in Italy, a couple of years after.

Q. Was this filed in Italy at the time your patent in Italy had been granted?

A. After that. After that, my patent was issued, but it was rejected over there and it was applied in France.

Q. (Mr. Trabucco): You say you made this invention in Italy? A. No.

Q. What did you say about the machine having been patented in Italy, or attempted?

A. Patented in Italy.

Q. Was this the machine that is shown on the drawing here?

A. The machine that shows on my patent here, the United States patent.

Q. The same construction as patented over there? A. Yes.

(Testimony of Arthur E. Barili)

Q. When was that?

A. Between one and two years prior to the issuance of that United States patent.

Q. When did you come into the United States?

A. Sir?

Q. When did you come into the United States?

A. 1904.

Q. Did you make your application for patent while you were in this country?

A. In this country.

Q. It was rejected in Italy, you say?

A. No. It was allowed in Italy.

Q. What year was that?

A. Well, it was—I am not sure, but one or two years before I got the United States patent. [43]

Q. Was that prior to the publication of this particular folder? A. Yes.

Q. Suppose this was published in 1916 or 1917, would it have been prior to that time?

A. It wasn't published at all—circulars. There wasn't anything published about it.

Q. Just what date was it you made your application in Italy?

A. I think it was about three or four months difference between the time I made the application in Italy and in the United States. The application—the United States application was pending for about eight years. In other words, I instructed my attorney to leave it in as as long as possible.

Mr. Trabucco: That is all.

Mr. Franklin: That is all.

Mr. Franklin: Call Mr. Cortopassi.

CARLO CORTOPASSI

called as a witness on behalf of plaintiff; sworn.

The Clerk: State your name in full to the court:

A. Carlo Cortopassi.

Direct Examination

By Mr. Franklin:

Q. What is your occupation?

A. Machinist.

Q. Where are you employed? [44]

A. Bianchi Machine Shop.

Q. Do you know anything about the ravioli machine that was made for the Marlo Packing Company.

A. I saw the machine over there.

Q. What is that?

A. You want to come closer—I mean, come close to me.

Q. All right.

A. I saw the machine. We built the machine over there.

Q. It was built in the Bianchi shop?

A. The machine was for the Marlo Packing Company.

Q. It was built in the Bianchi Machine Shop?

A. Bianchi Machine Shop.

Q. And sold to the Marlo Packing Company?

A. I don't know sold to them. From the report I saw——

Q. Did you work on that machine?

A. I did make many parts in all. The machine is pretty big, see?

Q. About what date was that, do you remember?

(Testimony of Carlo Cortopassi.)

A. The date? Q. Yes.

A. Before the war, I guess, six or seven months—six or seven years ago. More than that.

Q. Do you remember the construction of the machine, that is the rollers?

A. I remember the rollers. Explain what you want. I know what the rollers—what they are. You have to make ravioli. [45] You have to have the roller. It can go different.

Q. One of the rollers had pockets in it, had square molds in it, depressions? A. Yes.

Q. One roller.

A. One is support. Another to adjust, like go back.

Q. One roller is adjustable?

A. One is adjustable.

Q. One roller had the molds in it?

A. Yes.

Q. The other did not?

A. No, the rolls they got—they got that same shape.

Q. Do you mean that each roller had part of the mold in it, and they come together and made the complete mold? A. No.

Q. The molds were in one roller complete, is that right? A. Yes.

Q. And no molds in the other roller?

A. On both sides of that machine. The mold was on both sides.

Q. In both rollers? A. Yes.

Q. That is, half of the mold in one roller and half in the other? A. That's it.

(Testimony of Carlo Cortopassi.)

Q. When they came together, they made the full mold? A. Yes. [46]

Q. There were cutters that went around the rollers, that went around one roller—

Mr. Trabucco: This is leading, your Honor. I must object to it. It is obviously leading and not proper examination.

The Court: It is leading, Counsel.

Mr. Franklin: I just wanted to help him along.

The Witness: If you want me to make a sketch.

The Court: Make a sketch on the board.

The Witness: That is all I can do.

Mr. Franklin: You want to make a sketch?

The Witness: To explain this (indicating on blackboard). Every roller got a—

The Court: This man has to take everything you say down. Speak out so he can hear you.

Q. (Mr. Franklin): Where were the cutters, the cutters that go around?

A. No cutters.

Q. Didn't the rollers have something for cutting the dough into squares? A. No cutters.

Mr. Trabucco: That is objected to—

The Witness: They come out, pressing—come out the ravioli—to cut the ravioli.

Q. (Mr. Franklin): How do you get the ravioli into squares? [47]

Mr. Trabucco: That is objected to again, your Honor.

The Court: Objection overruled.

(Testimony of Carlo Cortopassi.)

The Witness: I am the machinist. I got the order from my boss. He give me sample, the dimensions, give me—I make. I cannot tell to you what the operation. I never went out of shop to see the machine. The boss give the dimension. I make the rollers like the boss wanted, because I just make a different part of the machine.

Q. (Mr. Franklin): You only made the rollers?

A. I made part of the rollers, because the rollers take a long time. The bench man make the machine. The man make—another man—many men work in the rollers.

Q. You never saw the machine in operation?

A. Never saw it.

Q. You never saw a ravioli come out of it?

A. No. I work all the time in the shop. I don't go out.

Q. You say you never saw any cutters?

A. No.

Mr. Franklin: That will be all.

Cross-Examination

Mr. Trabucco: I have two or three questions.

Q. Mr. Cortopassi, you say that machine you worked on was about seven or eight years ago?

A. Yes, sir.

Q. You do not know whether that was delivered to the Marlo [48] Packing Corporation or to the Superba Packing Corporation, or Meda Bros., in Sacramento, or to whom?

A. I suppose the machine to Marlo Packing.

(Testimony of Carlo Cortopassi.)

Q. How do you know? You don't know that, do you?

A. I cannot say where the machine went, because I am a machinist. The shipping clerk is something different. Suppose the machine, see, goes to Marlo Packing. It go to different parts. I am not the bookkeeper of the Bianchi Machine Shop.

(Witnessed excused.)

Mr. Franklin: Mr. Bianchi, please.

ACHILLE BIANCHI

one of the defendants, called as a witness on behalf of the Plaintiff; sworn.

The Clerk: State your name in full to the court.

A. Achille Bianchi.

Direct Examination

By Mr. Franklin:

Q. You are the defendant, Achille Bianchi, in this suit, are you? A. Yes.

Q. The defendant? A. Yes.

Q. You built a machine for the Marlo Packing Company? A. Yes, sir.

Q. Will you state what the construction of that machine was, as [49] to the rollers?

A. Yes, sir. What do you like to know?

Q. How about the molds and the rollers, for instance.

A. The mold? Q. Yes.

A. The molds are inside one of the rollers.

(Testimony of Achille Bianchi.)

Q. On both rollers?

A. Just in one, on particular, that machine there.

Q. On that model machine?

A. Yes, what we made, and both.

Q. You made machines with rollers, with rollers, with molds—

A. (Interrupting) Double, single, with none.

Q. The axial cutters, where were they located?

A. Axial cutter located in one roller.

Q. In one roller? A. Yes, sir.

Q. Is that the roller that has the molds in it?

A. No, sir. Q. It is a plain roller?

A. Yes.

Q. Where are the annular cutters?

A. Annular cutters—margins. Margin is on the rollers with the pocket.

Q. Roller with the—

A. (Interrupting)—Pocket, or the envelope, whatever you want [50] to call it.

Q. By "pocket," do you mean mold?

A. Yes.

Q. The depression in the mold?

A. Yes, sir.

Q. That was the machine that was sold to Marlo Company? A. Correct.

Q. Did you see that machine in operation?

A. Yes, sir.

Q. Did it have a weight in the hopper?

A. Never saw any. We never did put any. It isn't necessary any. Not even the machine Mr. Barili claimed patented has any.

(Testimony of Achille Bianchi.)

Q. Did you see any of the operators in the Marlo Packing use a 2x4 to push down?

A. I wasn't there when they did, if they did use it.

Q. You did not see that? A. No, sir.

Q. The lower ends of the hopper, were they cut to conform to the——

A. (Interrupting) Not necessary. They come down straight from the top to bottom, which the holes are very large size, by gravity. Will drop to the bottom without any counterweight or any block or any timber in it. And then you cut down to 45 degree. To the roller is no curve whatsoever.

Q. How do you keep the dough from going out the edges of the [51] hopper?

A. It can't go out, because the gravity of the dough is tight to the center of the hopper always. The hopper has guards to protect the dough to fly out the rollers.

Q. How do those guards go?

A. That is the hopper, itself, which you see them on the picture we have here for proof.

Q. Goes over the ends of rollers, does it? Does it go over the ends of the rollers?

A. It does, yes.

Q. You built and sold a machine to the Riviera Packing Company did you not? A. I did.

Q. Yes? A. Yes.

Q. When was that?

A. That was before the war. I tell you the truth, 1939 or 1940, something like that.

(Testimony of Achille Bianchi.)

Q. You don't know the exact date?

A. I don't know the exact time. I don't keep the exact time.

Q. Can you identify this ravioli machine as the one you built and sold to Riviera?

A. Well, I can identify up to a certain extent, but it is not clear enough. As far as I could see to it, it is my machine.

Q. On that machine, how were the rollers constructed on that? [52]

A. That, I won't know it, because we made rollers of all types. We had rollers with pocket margins on it; and we had rollers with pocket only, and margin on the other; and we had rollers with pocket and margin, so I don't know which one. That is too far back, and it is hard to remember.

Q. You built them in different ways?

A. Oh, yes, absolutely. Practically, I don't think I built two machines alike.

Q. Some of them, you had the cutters all on one roller? A. Absolutely.

Q. And some you had annular cutters on one roller and longitudinal cutters on the other?

A. I won't say that. I won't know there if I have done anything like that. It might be. I can't recall it.

Q. Can you describe——

A. (Interrupting) I can't. If it was a year ago or six months ago, I would say yes or no, like I had the Marlo Packing machine in my shop to be cleaned out after the war.

(Testimony of Achille Bianchi.)

Mr. Trabucco: It seems to me this questioning should be directed to some certain time, rather than generally speaking. There were machines made prior to 1940 probably which might be considered to be within the scope of this patent, but the defendant has not had any connection with those machines since they were sold.

Q. (Mr. Franklin): Were they made after February 9, 1932? [53] That is the date of the patent in suit.

Mr. Trabucco: That is again objected to, your Honor.

The Court: Objection overruled.

Q. (Mr. Franklin): Can you answer that?

A. What?

Q. Did you make—

A. (Interrupting): I made some before and some after 1932.

Q. You made them in different ways after 1932?

A. All different most of the time. We always improve on it.

Q. You make some with the cutters spaced in different ways on the rollers?

A. Well, yes, every type. According to the size of the roller. The cutter doesn't mean anything.

Q. On this Riviera machine did you have any adjusting means for adjusting the hopper?

A. Absolutely not. Right in the machine, never did have any adjustment. I never attempted to put in any, in the first place, because it is foolish to manufacture such a thing in a mechanical point, because it doesn't require. If it work in one posi-

(Testimony of Achille Bianchi.)

tion, it should work right through in the same position without any adjustment. The adjustment is not required whatsoever.

Mr. Franklin: I think that will be all.

Cross-Examination

By Mr. Trabucco:

Q. Did I understand you to say that on this [54] Marlo machine which I believe is illustrated in these photographs, and which at this time I would like to introduce for the purpose of identification, that both cutters were——

A. (Interrupting) One roller.

Q. I believe you made a misstatement, if that is what your testimony is now. You said previously that they were on separate rollers.

A. No, I didn't say that. I said that it won't matter where you put it. It will work just the same.

Q. On this particular machine which is illustrated on these photographs, are the cutters on one or two rollers?

A. One roller, and the other roller has the margin and the pocket, or the envelope.

Q. Then your testimony is that the one roller has both the longitudinal and the circumferential cutters? A. Yes, sir.

Mr. Trabucco: That is all.

The Court: It may be marked for identification.

(The photographs referred to were marked Defendants' Exhibit B For Identification.)

(Testimony of Achille Bianchi.)

Redirect Examination

By Mr. Franklin:

Q. Who was this machine made for, Mr. Bianchi, this exhibit?

A. Machine made from Bianchi Machine Shop, made for myself.

Q. Do you make ravioli? [55]

A. No, I sell them.

Q. Whom did you sell that to?

A. Marlo Packing Corporation.

Q. The Marlo machine?

A. That's right, sir.

Q. On that machine, you say you have the annular cutters. Where are those?

A. I will show you. The annual cutters are this. You see, this line here is a step, put out about 1/16 iron, the surface or the O.D. of the roller, and this side is zigzag, cutters which form the square on the ravioli, and this are the pocket, which I call pocket, of the ravioli, and this are the margin in both on this, and all the cutters is on the roller, this—they care to form the ravioli, and this—they care to cut them in squares (indicating.)

Q. You have all the molds and pockets in one roller? A. Yes, sir.

Q. And no cutters on that roller?

A. No, sir.

Q. I understand you to say in some of the——

A. (Interrupting) I say I might have. I can't remember back twenty-five or thirty years ago.

Q. I don't want you to go back that far. Within

(Testimony of Achille Bianchi.)

the last six years, have you made any different from that?

A. Yes, I made some rollers with the pocket, the margin, and [56] the cutter all in one roller, which we have a patent. I made it for the lady Mr. Trabucco has.

Q. Did you ever make any with the annular cutters on one roller?

A. Not that I remember, which is not necessary.

Q. The axial cutters on the other roller?

A. I can't recall. It doesn't matter a bit. You can put them any way you want to.

Q. Did you ever do it that way?

A. I can't recall.

Mr. Trabucco: Specify the time, will you, please?

Q. (Mr. Franklin): Within the last six years.

A. In the last six years I didn't. I am pretty sure in the last six years I didn't make any machine, at all.

The Court: He stated he never made machines alike.

The Witness: And the last six years I didn't make any.

The Court: You didn't make any in the last six years?

The Witness: No.

Q. (Mr. Franklin): Did you make any since February 9, 1932 with longitudinal or axial cutters on the roller that has the molds in it?

A. I don't recall.

Mr. Trabucco: That is objected to as incompetent, irrelevant, and immaterial, and not proving any—

(Testimony of Achille Bianchi.)

The Witness: I don't recall back twenty years ago.

The Court: One moment. [57]

Mr. Trabucco. He speaks of 1932.

The Court: Counsel has made an objection. Are you directing his attention to any particular time?

Mr. Franklin: I said after, I think, February 9, is the date of the patent in suit, 1932.

The Court: Yes.

Mr. Franklin: If he had made any rollers with longitudinal cutters on the roller that had the pockets in them. That goes to the question of infringement.

The Witness: That is pretty hard to answer that, because I won't recall if I did.

Q. (Mr. Franklin): You don't recall?

A. No, sir, because I can only go back as far as any time specified that I could remember, and after that, I won't remember.

Q. Will you swear you did not make them that way? A. No, I won't.

Q. You won't swear to that. Will you swear you did not make rollers with longitudinal cutters on the roller that had the pockets in that machine for the Riviera Packing Company?

A. I won't swear to that, either.

Q. You won't swear you did not?

A. No. Why should I swear when I am not positive? I am not that kind.

Q. I don't ask you to swear to anything about which you are not positive, but you don't know, you won't swear one way or the [58] other?

A. I can't if I am not positive.

(Testimony of Achille Bianchi.)

Q. Do you know where any of the cutters were on that machine that you built for the Riviera Company?

A. It must be a cutter. Without the cutter, you won't have the separation of the ravioli.

Q. You had the cutters, but I am asking do you remember which rollers you had the cutters on?

A. That is another question. I can't remember.

Q. You can't remember?

A. No. It isn't an item I have before me day and night. It is something that I had before me ten years ago. I can't remember now.

Q. Do you remember that machine that was sold to the Superba Company?

A. No. That is still too far. 1929 I built the first machine for Superba. 1927 I started and I delivered it in 1929.

Q. Do you remember discussing the two rollers with Mr. Barili that were made for the Superba machine? Do you remember that?

A. I don't recall. Not Mr. Barili, never. Barili never talked to me whatsoever. It is all an imaginary story that I heard so far this morning.

The Court: What is imaginary? The supposed conversation you had with him?

The Witness: I didn't have no conversation.

The Court: Did you have any agreement with him where you said you would not make the machine? The Witness: No, sir.

The Court: You deny that?

The Witness: Yes, sir.

(Testimony of Achille Bianchi.)

Q. (Mr. Franklin): Was this Marlo machine sent back to your factory for repairs?

A. No, sir. It was sent back to be cleaned after five or six years. It was in the shop during the war. They didn't have no occasion to manufacture ravioli, and the machine got rusty. It was impossible to use it again, so they sent it back to me so I can do the proper cleaning.

Q. Were there some repairs made?

A. When you clean it, if you see something that wear out, you put a new part in it.

Q. Was there something wrong with the scrapers?

A. There was no such thing a scraper, never heard any scraper in the ravioli machine. The scraper only work in hand machine. You have to scrape the tip after you dirty it.

Q. Isn't there a scraper for scraping dough off the roller?

A. No scrapers. We don't use no scrapers. Don't need no scraper. Never heard of it.

Q. Do you remember the Superba machine, whether there was a scraper on that, nor not?

A. Which Superba? Going back 1929? I can't remember. [60]

Q. Don't you remember that small machine that was used in the Exposition?

A. Made in 1937, delivered in 1939, delivered to the Exposition of San Francisco—worked in the Exposition all the time in demonstration, just for demonstrating our ravioli, how it is made, to the people.

(Testimony of Achille Bianchi.)

Q. Do you remember how those cutters were on that?
A. No, I can't.

Q. You don't remember any scraper on that machine.
A. No, I can't.

Q. That small machine?
A. No.

Mr. Franklin: I think that is all.

Mr. Trabucco: That is all at this itme.

(Witness excused.)

Mr. Franklin: I would like to recall Mr. Barili for a detail.

ARTHUR E. BARILI

recalled for Plaintiff, previously sworn.

Direct Examination

By Mr. Franklin:

Q. Mr. Barili, how did you learn about the Superba machine?

A. I learned about that infringement from the Patent Office, United States Patent Office. I had the patent printed there [61] and once I was notified that my patent was allowed, but it might take twenty days before it was issued, due to the fact that you had to go through the examiner on account of possible interference, and the party that was interfering was Pietro Muzio. He was the president of the Superba Packing Company at the time, and he was the one with the machine. The machine was sold to them prior to the time Mr. Bianchi made them a machine. So that led me to believe that another machine was made. So I came to San Fran-

(Testimony of Arthur E. Barili.)

cisco, and I went down to Mr. Bianchi's shop, and all the parts here and there on the floor, all numbered with paint, evidently was trying to copy, but the machine was already built and was in operation at the Superba Packing Company at the time. So we came to an arrangement with Superba Packing Company. They gave me a certain sum to give them a license, and they gave me the machine back, and—in Los Angeles—the machine I built. I took one machine. I think it was \$500.

Mr. Franklin: That is all.

Cross-Examination

By Mr. Trabucco:

Q. You say that was before your patent was issued even?

A. The patent was allowed when I heard that.

Q. It had not been issued?

A. But it would have taken about twenty days before it was issued, as it had to go through the law examiner. [62]

Mr. Trabucco: That is all.

(Witness excused.)

Mr. Franklin: I think that is all. We rest.

Plaintiff rests

Mr. Trabucco: There is probably a basis for a nonsuit, especially against the Marlo Packing Corporation. There isn't any evidence whatsoever showing they have used an infringing device. However, I presume you would like to have—

The Court: I would like to hear the whole nature of your defense. You can reserve your motion.

Mr. Trabucco: At this time, your Honor, I would like to introduce in evidence a certified copy of the file wrapper and contents of the Arthur E. H. Barili patent No. 1,844,142.

The Court: May be marked as Defendants' Exhibit next in order.

(The document was received in evidence and marked Defendants' Exhibit C.)

Mr. Trabucco: I will next offer the D. M. Holmes patent No. 518,454, dated April 17, 1894, entitled, "Machine for Forming Articles of Pastry or Confectionery."

The Court: May be marked Defendants' Exhibit next in order.

(The document was received in evidence and marked Defendants' Exhibit D.)

Mr. Trabucco: I also offer in evidence a copy of letters patent, No. 1,094,321, granted April 21, 1914, to E. Evans, [63] this patent being offered for the purpose of showing annular cutters on one roller and axial or transverse cutters on the other roller, the two sets of cutters cooperating to cut the dough into squares.

The Court: Defendants' next in order. May be appropriately marked.

(The document was received in evidence and marked Defendants' Exhibit E.)

Mr. Trabucco: Next I offer in evidence the United States patent issued to R. Oleri, No. 1,479,925, entitled, "Cylindrical Ravioli Shaper, Sealer and cutter." This patent was a combined device for cutting ravioli and sealing their outer edges. The cutters are arranged circumferentially between the molds and also longitudinally, and these cutters cut the ravioli dough into the required shape.

The Court: Defendants' Exhibit next in order. May be marked.

(The document was received in evidence and marked Defendants' Exhibit F.)

Mr. Trabucco: Mr. Bianchi, will you take the stand?

ACHILLE BIANCHI

called as a witness on behalf of Defendants, having been previously sworn, testified as follows:

Direct Examination

By Mr. Trabucco:

Q. What do you manufacture, Mr. Bianchi?

A. Ravioli, macroni machinery, tamales; numerous machinery.

Q. How long have you been engaged in this business?

A. For myself from 1922.

Q. Are you familiar with most of the equipment commonly used in the commercial and household manufacture of ravioli?

A. Yes, sir.

(Testimony of Achille Bianchi.)

Q. I will show you a copy of the Oleri patent and ask you if you have ever seen this device before.

A. Yes, that is what they call family used device which will form the ravioli and cut it in the same operation, which I think I have made more than one roller for this person here—the patent years ago, maybe twenty years ago.

Q. 1924? A. More than that.

Q. I will show you a number of photographs marked Defendants' Exhibit B For Identification, and ask you if you can identify the machine that is illustrated on these photographs.

A. Yes, this machine is made by me. This machine is a ravioli machine seen side view which distinguished the hopper which is a straight hopper, high enough to contain enough filling so that the gravity will press in the pocket of the rollers without any substantial increase in the weight, or any other device.

Q. Was that a machine sold to the Marlo Packing Corporation?

A. Yes, sir, this is a machine made for Marlo Packing, the way [65] I can see it here.

Mr. Trabucco: I offer these photograph in evidence.

The Court: They may be received and appropriately marked as Defendants' next in order.

(The photographs previously marked Defendants' Exhibit B For Identification were thereupon received in evidence.)

(Testimony of Achille Bianchi.)

Q. (Mr. Trabucco): Referring to those, you will notice there are small numerals placed on the right-hand corners. Will you identify those various views that are shown on the various photographs?

A. You mean calling letter "A" as the side view. In this side view, you can see the two calibrating breaks—the two calibrating breakers which the dough come through.

The Court: Calibrated?

The Witness: Breaker. Which the dough come from this point, here, indicating they put a roll which is very thick, the dough, and this calibrate it down to the thickness.

The Court: You set the calibration in advance?

The Witness: In advance. Some might require ten thousand thickness, the dough, some maybe fifteen, and twelve, and so forth. Also, you can see the side of the hopper, which is a straight up-and-down with 45 degrees to the roller; and my name shown on the side of the machine—Bianchi Machine Shop, 221 Bay Street. Photograph B: You will see angle side of the machine, left angle, with part of the hopper [66] side and front of the hopper, part of it, with one complete calibrating break which consists of two rollers and part of the roller which has no pocket, but has a knife from run of the rollers to the length of the rollers, and also the motor which will drive the same machine, and belt that takes the product out of the machine.

Photograph C: You will see the hopper and the right-hand roller with pocket, but no knives in it.

(Testimony of Achille Bianchi.)

My name in the hopper. The hopper, the same as I explained it before, straight down to the rollers with 45 degrees to the center of the roller.

Photograph D will show also part of the roller, top and bottom, which hasn't got no pocket, but contain knife on the length of the roller and the run of the roller, which will cut squares of ravioli, and the hopper on the left-hand side, with my name on it, coming down straight up and down with 45 degrees to the center of the roller, resting stationary on a piece of angle.

Q. (Mr. Trabucco): Referring to photograph E, describe the construction and location of the rollers: A. You mean E, or B?

Q. E.

A. I didn't have no E. Oh, I am reaching for that now. In regard to photograph E, we will see clearly on top of the roller with two angle on each side of the roller, which will [67] hold the hopper stationary, no adjustment whatsoever with it. One roller contain only the pocket and the margin, so they will form the pockets of the ravioli and squeeze the dough together to form a solid margin between two sheets of dough.

Q. On that particular photograph, it is clearly shown, is it not, that one of the rollers has both sets of cutters on it. The other has no cutters whatsoever on it.

A. No, sir. And one roller has all the cutters and——

(Testimony of Achille Bianchi.)

Q. Are these rollers in contact with one another?

A. They could never be in contact, because if they are in contact, the ravioli would be all separated by one by one, which by gravity, they would never drop out of the pocket.

Q. Then it is necessary that these rollers be separated?

A. A few thousandths opening so it will mark it close enough so they will naturally break off in a point, but they are not cut right through. They couldn't be, otherwise each ravioli would remain in those pockets and you will have to take it out by hand.

Q. Referring to photograph B, will you describe the construction of the hopper?

A. B, you say?

Q. Or D.

A. The hopper consisting of square or rectangular box resting on top of the bearings of the machine, two piece angle—no adjustment.

Q. Is the hopper adjustable as to height? [68]

A. No, sir, the two angles screw on top of the bearings of the two rollers, and there is no such thing as any adjustment.

Q. Does the bottom of the hopper conform to the contour of the rollers?

A. No. Clearly seen and on all the machines I have ever made, no such thing as concave with the rollers, or going down 45 degrees, or near to that degree, to the center of the roller.

(Testimony of Achille Bianchi.)

Q. Those sides of the hopper are not straight as shown in the Barili patent?

A. No, they also go down to 45 degrees to the roller.

Q. On any of your machines have the rollers been made in sections or in one piece?

A. All one solid casting, and they are machine grooved for the work you want to do and the size required for the customer.

Q. Have any of your ravioli machines been equipped with weights inside the hopper?

A. Never, which it isn't necessary.

Q. Have any of your hoppers been adjustable?

A. Never. Never did so, because how can they adjust the hopper? The man that makes ravioli, he wouldn't know if you ask him to raise it or lower it, put it sideways or lengthways, you will have to give him the machine 100 percent perfect, which he will take care of you after that, perfect the machine properly.

Q. You have seen the drawings that accompany the plaintiff's [69] answers to defendants' interrogatories, have you not?

A. Yes, sir, I saw the print.

Q. Did you ever construct the machine that is illustrated on those drawings? A. No.

Q. That is not of your manufacture?

A. No similarity, whatsoever.

The Court: Point out the dissimilarity.

The Witness: The dissimilarity is this. The dissimilarity—

(Testimony of Achille Bianchi.)

The Court: Take the hopper, for instance.

The Witness: Is the hopper that is made concave with the rollers—

The Court: Not at a 45-degree angle?

The Witness: Is not straight 45, but concave to that, which it does not show any opening there. Mine has at least a three-inch opening which to fill in the rest like in the middle, in a free flow state, and this here, probably in this type, they might have to have some way to come through a small pocket there. Besides that, we have some kind of tool post on one side—I don't know if on both sides—which insure support of the hopper with bolts which looks like an adjustment for some kind.

Q. (Mr. Trabucco): Referred to in there as being adjustable? A. It might be. [70]

Q. For the purpose of adjusting the height of the hopper?

A. I never done such a thing like that, and, furthermore, we kept this roller here way back as far as possible to give the dough a chance to conform themselves, not to be coming out after the squeezing from the larger dough to the smaller dough, and interfering with the filling times. Then, it crystallizes a little bit, the dough, so it will be keeping more uniform after they form on the ravioli. Furthermore, this ravioli is coming out with a double packet which Riviera—Marlo Packing Corporation has only the pocket in one side, but this is shown with double pocket.

The Court: I understand.

(Testimony of Achille Bianchi.)

The Witness: And now the rollers they were close one to the other one, this shape, that the man made the drawing here which I think is Engineer Arturo Barili, this ravioli won't hang up one against the other, but will drop, because are caught, naturally, which will never work, and if they hang up, that means they are going to run against the roller and go around and around several times and make a mess out of it.

The Court: They look like sausages.

The Witness: That's right, sir. They are formed, but not cut completely through, so they come out and get in this conveyor, then, according to the speed of the conveyor will separate farther out, will put the next conveyor a little faster, and they all separate, and there is no place to separate it here, [71] because they will remain.

The Court: Are they sold in sheets finally?

The Witness: Semi sheets, square, that is, for family use, and for cannery, they will—for cannery, they separate it and put them in cans for canning. And this here, for selling fresh, they are sold in rectangular boxes which contain 72 or 75 ravioli to each box. They prefer to have them to keep their form and keep together, that they will be easy to pack in the box for selling purposes.

Q. (Mr. Trabucco): That machine is not shown on the drawings, is not similar to the one you see on the photographs?

A. No. The motor is the same which they manufacture there.

(Testimony of Achille Bianchi.)

Mr. Trabucco: I believe that is all. Just a minute.

Q. I will show you this pamphlet or sheet which is marked Defendants' Exhibit A For Identification, and ask you if you can identify it.

A. This form, or whatever you want to call it, I pick it up myself in my own country, where I born, Milan, Italy, after World War I, before I was discharged from the United States Army and took it to America.

Q. What year?

A. 1919, and took it to America, myself, in my personal possession.

Q. On that pamphlet are a number of ravioli machines.

A. One ravioli machine—different type of ravioli made in a [72] different name, square, rectangular, or triangular, or other stuff, but the ravioli, itself, is square—the only one square.

Q. When did you first have knowledge of machines of that type?

A. This is the first time I ever saw a machine of that type. Of course, we made machines by hand, or with rollers, one roller or two rollers, or wood rollers—more of family affair. No such thing as a big market. They have to do for lifting ravioli those days, and this is the first one.

Q. Various types of machines, are there not?

A. That's right.

The Court: Is this a hand machine?

The Witness: They are all on motor—motorized.

The Court: This has a belt?

(Testimony of Achille Bianchi.)

The Witness: Yes.

The Court: Runs off a belt?

The Witness: Yes.

Q. (Mr. Trabucco): I will show you another patent which was issued in 1917 to Tommasini.

I will ask that this be marked.

(The document was marked Defendants' Exhibit G For Identification.)

The Court: I notice on this machine on the circular you received in Italy, it has a press at the top. Is that to force the [73]—

The Witness (Interrupting): That's right.

The Court: You work on gravity?

The Witness: I am working on gravity. Mine is 12 inches by 24 inches long. This is only a question of six inches wide and six inches long. The gravity is not enough.

Q. (Mr. Trabucco): We have in this Tommasini patent another type of automatic ravioli machine, showing two rollers and cutters on each roller.

A. That's right. This is another ravioli made in a different form, like half-moon, for instance. It isn't a square one, but is the same principle.

The Court: The record may not reflect this: What is the depth of the so-called pockets?

The Witness: The depth of the pockets consists on the order of the customer. If a customer wants to put, say, 50 ravioli in a can, another customer wants to put 60—

(Testimony of Achille Bianchi.)

The Court: You have different type rollers?

The Witness: Different types. You have to give him the capacity or size of ravioli, so there will be so many going in the can, according to the size of the can.

Mr. Trabucco: That is all.

Cross-Examination

By Mr. Franklin:

Q. On this Exhibit A For Identification you say all of those are ravioli machines?

A. No. [74]

The Court: Only one.

The Witness: Only the ravioli we are talking about. The only one I could see is this one, here (pointing), the one with the cross on it.

Q. (Mr. Franklin): Entitled, "Raviolara"?

The Court: They all have relationship to paste products, macaroni?

The Witness: Yes, the same thing I put out, myself.

Q. (Mr. Franklin): Regarding the position of the cutters, it is immaterial whether you have them all on one roller, or the annular cutters on one roller and the longitudinal cutters on the other roller, is that right?

A. Is immaterial in which you mean? As means of working conditions?

Q. Yes, for cutting them into squares.

A. It is immaterial, yes, sir.

(Testimony of Achille Bianchi.)

Q. You can put them all on one roller or you can put circular cutters on one, straight cutters on the other? A. Correct.

Q. And they will cut it into squares and they will perform the same function?

A. That is the last operation. The form is already done. The cutting is the last operation.

Q. And they will cut no matter which way you make them?

A. We make most of the ravioli machines without cutters whatsoever. We make them just to form it and out they go in another [75] department—takes care of the cutting of the ravioli. That is the large capacity ravioli maker—they won't use the cutters whatsoever on the ravioli machine. They go out of the department completely, through the conveyor system.

Q. That is another system. A. Yes.

Q. So far as these particular machines are concerned, you do have circular or annular cutters and straight cutters, axial cutters, and longitudinal?

A. You have to have mobile—stationary—you have to have some kind of cutter.

Q. They will operate no matter which way you put them on the rollers, whether you put them all on one roller?

A. Yes, sir, it don't make any difference.

Q. The only difference between yours and your rollers and Barili's rollers in this patent is you put all the cutters on one roller?

A. Yes.

(Testimony of Achille Bianchi.)

Q. That is the circular cutters?

A. Sometime we don't put none at all on any roller. We use outside cutters.

Q. If you are doing your cutting outside?

A. Yes.

Q. The only difference then is the transportation of the axial cutters over onto the other roller that has the annular cutters [76] on it, the difference between yours and Barili's?

A. I don't know what Barili has.

Q. You have never seen Mr. Barili's?

A. I don't think so.

Q. Can you read drawings?

A. Yes, sir.

Q. Can you read this drawing?

Mr. Trabucco: Let him understand the question when he gets through with that.

The Witness: That drawing, he has some lining in the long ways of the roller and lining in the runway of the roller, the diameter of the roller, but he also has section of the rollers.

Q. (Mr. Franklin): We are not going into that. I am just going into the cutters.

A. This is not a cutter completely, because the roller does not come close enough to cutter. You see, they come down in the form of a chain. If they were cut in, they would drop more like a drop forge.

Q. I am speaking of the roller here, you see the axial cutters? Are those axial cutters there?

A. Yes.

(Testimony of Achille Bianchi.)

Q. Are those annular cutters, there?

A. That's right.

Q. Which are numbered annular cutters 13, 14, and axial cutters—[77]

A. (Interrupting) 16 and 15.

Q. 16 and 15. All right.

The Court: We will take a short recess.

(Recess.)

Q. (Mr. Franklin): Can you state just how the hopper is held on in position there, Mr. Bianchi?

A. By two pieces of angle steel resting on top of the two bearings of the rollers, and the hopper rest on top of the angle.

Q. Just rests on it?

A. Just rests on it.

Q. And you can lift it off?

A. When you wash it, you will have to take it off to clean it.

Q. You have the angle plates upstanding from the frame?

A. No, they are screwed on top of the bearings.

Q. They are secured? A. Yes, sir.

Q. On the bearings on the frame?

A. Yes, sir.

Q. Stationary, and the hopper—

A. (Interrupting) Rests inside the angle.

Q. On the upper edge?

A. It doesn't meet the upper or bottom edge.

Q. Rests on those plates? A. Yes.

Q. And just rests there? [78]

A. That's right.

(Testimony of Achille Bianchi.)

Q. And you can lift it off when you want to clean it out? A. That's right.

Q. The hopper is detachable?

A. Oh, yes, it has to be removed for washing it, cleaning.

Mr. Franklin: That will be all.

Mr. Trabucco: Defendants rest, your Honor.

The Court: Step down.

Defendants Rest.

Mr. Franklin: I think that a motion for judgment for the plaintiff is in order, and the prior art that is shown here we contend does not anticipate the patent, because there is really no prior patent that shows an automatic ravioli making machine, according to Mr. Barili's testimony. This machine, here, that is set up in this publication was a machine that was made after a machine that he had. Anyway, that wasn't set up in the answer for invalidating the patent, and can't be taken as evidence.

The Court: Reference is made to Holmes, Evans, and also Oleri.

Mr. Franklin: Yes.

The Court: Let's take up first the alleged infringement on the part of the defendant before we discuss the prior art.

Mr. Franklin: Yes. Well, the testimony of the defendant [79] Bianchi shows that they made a machine with rollers that had pockets and that had knives, or cutters, and he has testified that he has made them both ways, he has made them with cut-

ters on one roller alone, and pockets in the other roller alone, and some with rollers with cutters, part of the cutters on the roller that has pockets and other cutters on the roller that hasn't the pockets. Well, it seems that that is broad enough to come within the scope of this patent, here, and he has testified that it is immaterial how you dispose those cutters, whether you have them all on one roller or part on one roller and part on the other, or annular cutters on one roller and axial cutters on the other, like Mr. Barili has them here. So the question of where you put these cutters is not material.

The Court: Isn't that a matter of mechanical—

Mr. Franklin: Equivalency?

The Court: Yes. Proceed.

Mr. Franklin: So there is a very elementary rule of patent law that transposition of parts or reversibility of parts does not avoid infringement.

Now, with this Marlo machine, we have the one roller with the pockets in it, and no cutter on it. The other with both cutters, both axial cutters and annular cutters. The only difference there between the patent in suit is that all he has done, he has taken the axial cutters of this roller and put them on the other roller, just transposition [80] of those cutters. That has not changed the operation of the machine. It has not accomplished any new or different result. It performs the same function in substantially the same manner, and accomplishes the same result. There is identity of means, func-

tion and result. It is a clear case of infringement. That is all we have to prove.

And so I think that that is about all we have to say on the question of infringement, particularly as to this claim 4.

Now, the attorneys for Superba Company recognized that Mr. James Naylor, one of our leading patent lawyers in San Francisco, and I might say on the Pacific Coast, recognized that and made an offer of judgment. So it seems to me this question of infringement is very clear.

The Court: Wasn't there a license agreement involved in that Superba matter?

Mr. Franklin: There was a license on that early machine in 1932, and then the small machine came out later which was practically a duplicate of it, and that was admitted in their pleadings—said it was a miniature machine. And that is the machine from which the drawings were made which Mr. Barili, from his interrogatories, and from the information he got over the telephone from Mr. Gierth—

The Court: May I have the original letters patent? I want to follow you as you proceed. [81]

Mr. Franklin: Yes, this is my copy. I think there is one the court has.

The Court: 1 in evidence.

Mr. Franklin: Take that Claim 4.

“In a ravioli machine, a pair of inter-gearred rollers, one roller having indented molds and provided with axial cutters between said molds,

the other roller being made with annual peripheral cutters adapted to be positioned between the molds of the first-named roller at the point of contact of the rollers, all the molds being spaced apart so as to provide a wide margin between the cutters and the molds, means for feeding sheets of flour paste to the rollers, and a detachable open bottom hopper for guiding stuffing to the paste sheets on the rollers.”

Exception was taken to the question of point of contact of the rollers. That is a statement that should not be taken literally, that they actually contacted. It means that the point where the rollers come closest together. That is the only way to read that, because certainly the machine would be inoperative if they were in actual contact. That must be construed to be within such contact, within such nearness of contact, as to permit the ravioli to go through the rollers. Certainly, that isn't the intention of the patent, and the patent should not be given such a literal construction as that, because Fig. 4 shows that there is a slight space between the two rollers, as measured by the depth of the knives, and that small space permits the ravioli to go through. That is also shown in Fig. 8, showing the ravioli to go through. Of course, the claims have to be construed in accordance with the specification and the drawing. That is a very poor expression there, and could have been improved upon, but still that claim should not be held literally to a statement which obviously means that the rollers

come at the closest point there together, that the cutters are adapted to the position between the molds of the first-named roller at the point of contact of the rollers.

The Court: What would be your interpretation of point of contact?

Mr. Franklin: Point of contact would be at the nearest point at which the rollers came together. It would be the cutters do contact. We might say when you speak of the roller and the cutter being part of the roller, it is a point of contact, because the annular cutters, 12-B, 12, 13, do come practically in contact.

The Court: On this diagram, they are shown in contact, aren't they?

Mr. Trabucco: The rollers, themselves, are not in contact. The cutters contact the rollers.

Mr. Franklin: Yes, they contact to cut the ravioli into squares, and there is a little space, but there is a point where [83] these rollers come nearest together, and that is what was meant, at their nearest point where they are closest together.

So, the Marlo machine has all the elements of that claim. There is nothing more than a transposition of parts. Of course, it says that the "detachable open-bottom hopper." Well, there was some question about detachable, but Mr. Bianchi has just testified that the hopper rested on a stationary part, and you could just lift it right off. If that isn't detachable, I don't know what detachable means.

As for the weight, claim 3 specifies a weight. Well, of course, they may not use a weight, but

there has been testimony, I think, here by Mr. Barili to the effect that he was informed that they used a 2x4 to force the filling down if it doesn't feed fast enough, and that using a 2x4 or anything to push it down would be the equivalent of a weight.

So I think at least claim 4 and claim 3 are infringed. They deny they made them in sections and they deny that the lower end of the hopper conforms to the rollers, service of the rollers, but at least there is claim 3 and claim 4 in which there appears to be no question about infringement there. All the defendant has done, he has taken these axial rollers off of the axial cutters, of the roller that has the molds in it, and put them on the other roller with the annular cutters. All he has done is transposed one part, and it is very elementary in the patent law that transposition of parts does not [84] avoid infringement.

I can cite a number of authorities on that question which I do not have now, and I would like to have an opportunity to prepare a brief of authorities.

On the question of anticipation here, this Holmes patent, as I understand it, it makes stuffed macaroni, tubular pastry articles like macaroni, and they are stuffed with material, and there is no means in that patent for cutting ravioli into squares and for filling the ravioli, and for closing down the edges around the ravioli to hold the ravioli in the pocket.

This Oleri patent, I would say, that it isn't an automatic machine and Mrs. Oleri sued Mr. Barili on that patent, and I represented Mr. Barili, and

that case was dismissed—no infringement. There is an old rule in patent law. I don't know whether I can quote it or not. "That which infringes if later, and if earlier anticipates"—Well, I would say that which does not infringe—I can't apply it there, I am sorry. There is a rule to that effect, but if it doesn't anticipate—Anyway, that case, that suit was dismissed, and it isn't an automatic machine. It doesn't have any means for feeding the dough in between rollers and for cutting them automatically.

This Evans machine is a machine for manufacturing of feeding cake. It has a number of cutters there on it, but those rollers on that are not constructed in such a way as to [85] bring the ravioli down to the edges to form a flange at the edges where it closes in and leaves a pocket to hold the ravioli in.

That Holmes patent does not show that feature. The mold is different, altogether. That is the Evans patent. The Holmes patent, that is a stuffed macaroni patent. And those do not show it or anticipate the patent in suit, and neither does this publication here which Mr. Barili has given in his testimony, that that was subsequent to his machine, and he is not contradicted by anyone here. And, of course, this publication that I understand was picked up after the first World War, but it looks pretty fresh to me for a publication that is that old. Anyway, that publication was not set up as an anticipation, and to invalidate the patent in suit, so I think that the patent is clearly valid, in view of what art has

been set up, and is clearly infringed by having the identical elements with only one transposition of one element, and the claim 4 and claim 3, if they use a 2x4 to push down the material.

The Court: What about the case of the Exhibit Supply Company vs. the Ace Products, a recent Supreme Court decision, to which reference was made by counsel? Are you familiar with that case;

Mr. Trabucco: That is particularly in point in connection with this claim No. 4. [86]

The Court: No. 4, that is what I have in mind. After all, No. 4 is the basic.

Mr. Trabucco: That is the only claim there would be any question about in this. There is no weight used. The hopper is not adjustable.

The Court: No. To what extent, Mr. Franklin, do you regard the segmented roller as distinguished from the one piece, that is, the rollers in parts as distinguished from one casting?

Mr. Franklin: Well, of course, that probably is a good way to make it, and they say they don't make it that way. It is immaterial.

The Court: Aren't you bound in the strictest sense under No. 4 under the authorities applicable?

Mr. Franklin: I would say not. Of course, the patent is not limited to a particular way of that showing. That is only way that roller could be made. The roller could be made in numerous different way and claim 4 does not limit the roller to any particular way in which it is made. You are not limited in the claim except where there is some

specific statement it must be made that way. Claim 1 brings that out, I think, one of these claims:

“A plurality of cylindrical sections and circular knives of a larger diameter between said sections; in combination with—”

Claim 1 would not be infringed unless it were shown that [87] the defendant made the rollers in cylindrical sections, which they say they do not, and that may be true. Of course, from those photographs—

The Court: Claim 1?

Mr. Franklin: Claim 1, yes. And that claim is limited to rollers made in sections by claim 4.

The Court: Claim 1 reads:

“In a ravioli machine, a cutting roller comprising, a plurality of cylindrical sections and circular knives of a larger diameter between said sections; in combination with a second roller comprising, a series of cylindrical sections having convex annular beveled edges and a series of cylindrical disks fitting between said sections, the periphery of said disks having transverse grooves the edges of which are beveled—”

Proceed.

Mr. Franklin: I will not maintain infringement of claim 1 for that reason, but I do maintain that claim 4—

The Court: Do you abandon all of the other contentions?

Mr. Franklin: Except as to 3 and 4. There has been some testimony that a 2x4 was used to push down the ravioli material, and if that were done that is equivalent to a weight. A weight and a spring are mechanical equivalents——

The Court: Doesn't the defendant in the case at bar claim gravity as sufficient weight to bring the material into positions? [88] Wasn't that the testimony of Bianchi?

Mr. Franklin: What is that?

The Court: With respect to No. 3, we have narrowed this down to claims 3 and 4. I recall Mr. Bianchi's testimony, one of the defendants in the case at bar, to the extent he testified and relied, at least the machine relied on the force of gravity to bring the material, the content of the ravioli, into position.

Mr. Trabucco: That is correct. The testimony is that no weights of any kind or other extraneous means were used in the hopper.

Mr. Franklin: That is what he testified. He didn't know they were. But there is no one here from the Marlo Company that operated those machines to tell——

The Court: In No. 3, at the conclusion of the claim:

“An open bottom hopper above the rollers for guiding stuffing to the paste sheets on the rollers, and a weight insertable in and loosely fitting said hopper for pressing the stuffing against the paste sheets.”

Mr. Franklin: That is shown in Fig. 1 of the patent drawing.

Mr. Trabucco: I shouldn't think counsel would contend that would be patentable anyway.

The Court: You gentlemen, I assume, spend most of your waking hours in patent matters. I assume you, too, Mr. Franklin. [89]

Mr. Franklin: Yes.

The Court: And it would seem to me as if that might be a rather ridiculous contention.

Mr. Franklin: Of course, the claim was allowed, and evidently gravity alone will not force it down sufficiently at times. I can conceive where that would be. Of course, sometimes this filling maybe of a different consistency. It may be thick, it may be thin. When it is too thick, you would have to have something to force it down to make it operate to the best advantage, and that is the information that Mr. Barili had.

The Court: I think basically the claim under 4 is the crux of this whole problem, isn't that true? I regard claim No. 4 as the very crux of this case, if there be any problem at all.

Mr. Trabucco: I would say so, too, but I don't think there is any question as to claim 4.

The Court: It is virtually narrowed to that.

Mr. Trabucco: Yes.

Mr. Franklin: Yes. That is the claim on which the Superba judgment was offered on that, and that is also the claim on which infringement was admitted by the Riviera Packing Company, so there have been some pretty good lawyers that have

gone over this patent, and there seems to have been unanimity among those [90] from which we have brought suit before that claim 4 was infringed by the machines that were used in manufacturing ravioli, and they were both Bianchi machines—the Riviera Company and the Superba Company.

I think we made out a clear case of validity of the patent and infringement. I think the judgment should be rendered in favor of the plaintiff, and if the court wants some authorities as to the question of transposition of parts and the equivalency and infringement, and things of that kind, I would be very glad to furnish them.

Mr. Trabucco: Of course, this patent is susceptible only of a very narrow construction, particularly in view of the rather difficult time the patentee had in the Patent Office.

The Court: Six years.

Mr. Trabucco: Not quite six years, but over five. And the continuous correspondence back and forth between the applicant's attorney and the Patent Office indicates he had a very difficult time in securing the allowance of any claims, and, as a matter of fact, I think counsel for the plaintiff has lost the gist of this whole thing, and why the patent was finally allowed, and that was because wide marginal spacing was between the cutters and the molds which the defendant contended, or the applicant contended sealed the ravioli at the outer edge. And that, I believe, is the reason why, for instance, claim 3 was allowed, because the claim specified [91] that there was a wide margin between the mold and the

cutter, and this margin sealed the paste together, the two sheets of paste together, so that the interior part of the ravioli could not escape. It stands to reason that the Patent Office would never have allowed a claim on the basis of a weight that was inserted in a hopper, because that is too obvious, anybody could think of that, a child could. That reason for the allowance of that claim was because of that particular provision in that claim, and that is one reason why I offered in evidence this Oleri patent to show the wide margins between the cutters and the molds, which sealed automatically and cut the ravioli material to prevent the interior part of the ravioli from escaping.

In this particular case, your Honor, the court must be controlled, that is, the decision of the court is controlled by the proceedings in the Patent Office, and by the authorities which interpret patents, and also in view of the prior art. The patent is quite limited in scope and in considering the entire question it appears quite obvious that the plaintiff has not made out a prima facie case. Of course, the evidence is more or less confined to the machine used by the Marlo Packing Corporation, and shown on these photographs. That is the only evidence we have that there might possibly have been some infringement.

The Court: Of course, the plaintiff's case was predicated [92] upon fleeting conversations he had with Gieth.

Mr. Trabucco: Yes, which, of course, were rather vague and certainly nothing definite came out of

that conversation to predicate a charge of infringement. Would you care to have me discuss all the claims, or claim 4?

The Court: I think counsel has virtually if not by expression by necessary implication, limited the contention now to claim 4.

Mr. Franklin: Claim 4 is the——

The Court: That is my understanding of the problem.

Mr. Franklin: Yes.

The Court: I would like a discussion on that, Mr. Trabucco.

Mr. Trabucco: All right. If the Court will take these photographs and follow me, I will be glad to read what I have here.

The Court: Mr. Trabucco, did you provide opposing counsel with a copy of the memorandum you submitted to me?

Mr. Trabucco: No, I haven't, your Honor. I have an extra copy which I will be glad to turn over to him.

Claim 4 reads as follows:

“In a ravioli machine, a pair of inter-gearred rollers, one roller having indented molds and provided with axial cutters between the said molds, the other roller being made with annular peripheral cutters adapted to be positioned between the molds of the first-named roller.”

In that particular phrase we have the location of two rollers with one roller having indented molds and axial cutters, and the other roller having annu-

lar peripheral rollers and these cutters are adapted to the position between the molds of the first named roller at the point of contact of the rollers.

“all the molds being spaced apart so as to provide a wide margin between the cutters and the molds, means for feeding sheets of flour paste to the rollers, and a detachable open-bottom hopper for guiding stuffing to the paste sheets on the rollers.”

This claim is limited to a combination, including a roller having axial cutters and a second roller having annular cutters. The claim is further limited to a structure wherein the rollers are in contact with one another.

In the machine manufactured by defendant Bianchi and sold to defendant Marlo Packing Company, and shown on these photographs, the axial and annular cutters are both on one cylinder, the other cylinder having only the molds thereon. In the machines manufactured by Bianchi the rollers do not contact with one another. There is no infringement of this claim since the accused machines do not embody the structures set forth and described therein.

In determining the question of infringement, it is well to keep in mind the well-recognized doctrine stated as follows in *DeCew vs. Union Bag & Paper Corporation*, 57 Fed. Supp., 388. at page 395: [94]

“The claims, as the measure of the invention, not only define the limits of the patent monopoly, but also determine the scope of the

art, and these boundaries, established by the patentee, may be neither extended nor shortened to meet the exigency of a particular situation." In *White vs. Dunbar*, 119 U. S. 51, the court stated:

"Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction by merely referring to the specification, so as to make it include something more than, or sometimes different from what its words express. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public as well as an invasion of the law to construe it in a manner different from the plain import of its terms."

And in the same general effect, the case of *Flowers vs. Austin-Western Co.*, 149 Fed. (2d) 955, the court states:

"Thus it is clear that each of the patents is one of improvement on a combination of elements in prior use. In such a field the claims are not entitled to a broad and liberal construction, but on the contrary, the range of equivalents includes nothing not substantially identical with the means described in the patents, and the use of other known means, although equivalent in function will be excluded."

And particularly applicable here is the rule as to claim interpretation set forth in *Royer vs. Coupe*, 146 United States Supreme Court Reports 524:

“The principle thus laid down is, that where a patentee on the rejection of his application inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it.”

Also pertinent here is a ruling in *McClain vs. Ortmyer*, 141 U. S. Supreme court Reports—

The Court: I have read that.

Mr. Trabucco: There is still another compelling reason why claim 4 must be held to be not infringed. An examination of the file history of the Barili patent, page 40, discloses that claim 29 was added after the patent application was filed. This claim specified that one of the rollers had molds with axial cutters between, and that the other roller had annular peripheral cutters positioned between the molds. The examiner rejected the claim on the ground that it was vague—page 41 of the file history. The applicant Barili then canceled claim 29 and substituted claim 31—file history, page 42, following which the examiner again rejected the substituted claim and required that the limitation at the point of contact [96] of the rollers be inserted before it could be allowed. The applicant then amended the claim by inserting the required limitation.

Now, under the well recognized principles in patent law, an applicant by inserting limitations in a claim in order to secure its allowance, cannot later in a suit for infringement ignore these limitations and contend that an accused structure not having the limitations, infringes. The recent United States Supreme Court case of the Exhibit Supply Co. vs. Ace Patents Corporation, 315 U. S. Reports, 126, at page 136, is directly in point here. The facts are quite similar to those of the present case, and the legal principle involved is applicable here. The applicant, in the Ace Patents case, by amendment during the prosecution of the patent application, limited claim 4 in order to secure its allowance by inserting certain limitations as to the location of certain elements of the combination sought to be patented.

The Supreme Court, in its decision, stated as follows:

“Had claim 7 been allowed in its original form it would have read upon all of the accused devices since all of the conductor means complementary to the coil spring are ‘carried by the table.’ By striking that phrase from the claim and substituting for it ‘imbedded in the table’ the applicant restricted his claim to those combinations in which the conductor means, though carried [97] on the table, is also imbedded in it. By the amendment he recognized and emphasized the difference between the two phrases and proclaimed his abandonment of all

that is embraced in that difference. The difference which he thus disclaimed must be regarded as material, and since the amendment operates as a disclaimer of that difference, it must be strictly construed against him. As the question is one of construction of the claim it is immaterial whether the examiner was right or wrong in rejecting the claim as filed. It follows that what the patentee, by strict construction of the claim, has disclaimed—conductors which are carried by the table but not imbedded in it—cannot now be regained by recourse to the doctrine of equivalents which at most operate, by liberal construction, to secure to the inventor the full benefits, not disclaimed, of the claims allowed.”

By applying the principles set forth in the *Ace Patents* case to the case at bar, it will be readily seen that Barili, in amending claim 31, now claim 4, through the insertion of the words, “at the point of contact of the rollers,” abandoned any exclusive right to a combination employing rollers which were not in contact. In other words, anyone has the right to use forming and cutting rollers which are not in contact with one another. Defendants have never manufactured or used a machine in which the rollers were in contact. On the contrary, [98] the rollers are appreciably separated in defendants’ accused devices. Claim 4 is not infringed.

And further, of course, it is obvious that the defendants’ device does not come within the scope

of claim 4 since it hasn't got the two rollers, one having the peripheral cutters and the other the axial cutters. It comes without the terms of that particular claim and, of course, the patent is only susceptible of a narrow construction. You can't say that the doctrine of equivalents can be applied in this case, because it can't. The patent is susceptible to only a narrow construction. The prior art anticipates, as a matter of fact, the claims of this patent, and so far as equivalency is concerned, it cannot be applied here, at all. The plaintiff must at best rest on just exactly what this claim says, and that is all. He can't broaden it in any regard.

On the question of invalidity of the patent, I have some remarks to be made there.

The Court: You direct attention to another phase?

Mr. Trabucco: Yes.

The Court: What is that?

Mr. Trabucco: That is on the question of validity of the patent. I don't believe the patent is valid for one thing. Whatever slight improvements were made by Barili over the prior art are insignificant. For instance, the weight is one. The adjustable feature of the hopper is shown in Holmes. [99] The Holmes patent shows two rollers which are forming and cutting rollers, and operate in the same manner as Barili's two rollers. One is equipped with what might be termed the cutter and the other is plain, so that one roller cuts the sheets of paste which are stuffed with stuffing material and seals them automatically.

The Court: Is that a macaroni machine?

Mr. Trabucco: It is an analogous art. It isn't a ravioli machine, but it doesn't have to be a ravioli machine to anticipate. It is an analogous art. I would like to go over this patent with you, your Honor, if you care to.

The Court: You may.

Mr. Trabucco: You might follow my copy.

The Court: By the way, Mr. Franklin, have you the record before you made reference to by Mr. Trabucco in connection with the examiner's findings in the file history? Have you the file history?

Mr. Franklin: I don't have it.

The Court: You are thoroughly familiar with it, I assume, naturally having tried some of these cases.

Mr. Franklin: Yes.

The Court: This is the Holmes patent?

Mr. Trabucco: Yes. I would like to have the Evans patent, too. It will be noted in this Evans patent that there are two rollers, one which has annular cutters. This [100] is an enlarged section of that, of those two rollers. This is one of them, and this is the other. This roller has the annular cutters which are shown here, too. They extend clear around this roller, and the other has axial cutters, a number of cutters, which is set between these annular cutters. These are the transverse cutters. This is looking at it from the end and this is looking at it right down on top of the drums, so that when these two drums rotate as shown here, the paste is held in position on top of the roller by means of these two plates on the ends of the drums

which contain the paste and which act as a hopper. Then the paste is fed between the two rollers and automatically cut into squares by these two sets of cutters, one set being transversely arranged and the other set extending around the periphery of the other drum.

The Holmes patent, No. 518,454, discloses in Fig. 1 two pairs of rollers, *d, d*, which act to feed the paste or dough forward and also to form the dough into sheets of desired thickness. Page 1, lines 5 to 6 of the Holmes patent. Then we have roller, *e, e*, for forming and uniting the sheets of dough, and these two rollers correspond to Barili's two rollers, which also form and cut the sheets. The patentee Holmes' description of the operation as forming and uniting rollers. He calls them forming and uniting, because they form the material and also unite it by pressing the two sheets [101] of material between which the stuffing is inserted, presses them together, and unites them. So the two sheets of semi-forms of paste are carried forward each toward each other upon the roller *e* and at the point where the two rollers *e* come in contact with each other the edges of the semi-tubes or forms are brought into adhesive contact with the edges of opposite semi-forms, and these edges unite and thus complete tubes are formed. Holmes specifies in his patent that that action takes place. That is precisely what Barili does in his machine. He has two rollers which operate in opposite directions the same as Holmes does, and he cuts his material into certain forms and unites the sheets of paste together

to form a seal for the enclosure of the stuffing material. In that respect, there is really no difference whatsoever between the Barili device and the device shown in the Holmes patent.

The hopper or filling device is shown on Holmes, that is shown by the letter i. It is possible to feed the stuffing material between the paste sheets as they pass over the rollers e, e. This hopper or reservoir, as the patentee calls it, is adjustable. He specifies specifically it is adjustable—page 2, line 73 to 94. It describes the adjustability of the hopper. And the cutters on the rollers, as stated, function to form the material into longitudinal tubes or enclosures for the stuffing material. Even the feature of [102] cutting these longitudinal members into sections is provided and shown in Holmes' patent in Fig. 11. One of those rollers has cross members on it which, when rotated, automatically cut those filled confections into certain lengths. In this respect, Fig. 11 shows that construction and lines 102 to 114 describe their operation—page 3, lines 102 to 114. The annular ridges on the rollers e, e, cut the joined sheets longitudinally and the projections X (See Fig. 11, Holmes patent and description on page 3, lines 102-114), "cut them transversely." So there really isn't all of the elements of this Barili sheet fully shown in the prior art. Whatever minor changes that were made by Barili certainly don't come in beyond the scope of one skilled in the art. They don't amount to invention, and I believe in the discussion I have given the court, which I will elaborate on with additional authorities

if the court sees fit to accept them, I believe it is clear that whatever changes Barili has made do not constitute invention, and even if it is considered it is invention, as far as claim 4 is concerned, certainly there is no infringement, since the defendants' machine has its cutters all on one cylinder, and the rollers don't contact.

The Court: Counsel argues on the theory of mechanical equivalent, is that true?

Mr. Trabucco: That is what he contends, but, of course, in a matter of this kind, where a patent is only susceptible [103] of a very narrow construction in view of the prior art——

The Court: Particularly in view of limitations imposed by the examiner.

Mr. Trabucco: Yes, your Honor.

The Court: Counsel?

Mr. Franklin: The statement, you know, that this is a very narrow patent, that isn't correct.

The Court: Mr. Trabucco, pardon me. Before you advance into your argument, or your reply, counsel, although this may be immaterial, nevertheless Mr. Franklin has made reference to the Superba Packing litigation. The attitude adopted by counsel with respect to the matter, I do not know whether it requires a response for the record or the court. Have you any response to make to the attitude adopted by Superba in connection with this litigation?

Mr. Trabucco: Well, of course, the settlement was entirely favorable to Superba. That made the proposition in order not to incur further expense

that if Barili could take judgment against them, but he would have to pay costs. Apparently they had entered into a contract with Barili in 1932 and had paid for this machine already, so he couldn't have proved any infringement as far as they were concerned, and so they got off the hook, you might say, by he having to pay the costs that they had incurred.

The Court: There was a license and agreement entered into. [104] Reference is made to it in the pleadings.

Mr. Franklin: There was a license agreement made with Superba that they could use that one machine, and one machine only, but they built the second machine that was used over at the Exposition. And in that respect, Bianchi didn't keep his agreement; and, of course, against the Superba, we realize that we couldn't expect to collect much damages out of a small machine like that, that had very little use. Our only reason for joining with Superba was to take that little machine out of circulation. There would have been a profit made on it and Superba was negotiating with another concern to sell that machine. On the question of paying costs, we didn't pay the costs. Superba paid the costs. That statement is incorrect.

Mr. Trabucco: I disagree with him, your Honor.

Mr. Franklin: We collected something like \$25 and we got an injunction against the Superba. That machine was taken out of circulation, and Mr. James Naylor represented the Superba people in that case, and he is a very able patent lawyer of

San Francisco, and one of the best, I think. Now, saying that this Barili machine is nothing but a narrow machine, that isn't true. It is really a pioneer invention. It is the first practical and successful automatic machine for making ravioli and there is no other on the market. The only thing we have are those made by Bianchi, and they are [105] copies, with just slight changes. All that Bianchi has done, he has taken the axial cutters off of one roller and put them on the other roller, transposed just one part, and transposition of parts doesn't avoid infringement. I would like to cite authorities on that. I have plenty of authorities to cite on that point.

As for the wide margin which is specified, there has to be a relatively wide margin. We haven't specified a particular dimension, but that margin must be wide enough around the filling so that it will not come apart. Now, there has to be a substantial margin around the edges, around all four edges of the ravioli to hold it in, to seal it effectively. That is the way all ravioli are made. You can notice all ravioli are made that way. They have to be.

The Court: What is the answer to the argument made by Mr. Trabucco with respect to the, or made as a result of the findings of the examiner?

Mr. Franklin: I don't see any limitations. Suppose he did? Nevertheless, if the defendant follows the construction, no matter how many limitations there are, it is an infringement, and claim 4 is very clear. They have all the elements of claim 4.

The Court: The adoption of the language.

Mr. Franklin: That statement at the point of contact, [106] there is really——

The Court: Mr. Trabucco's argument in substance is as follows: Following the doctrine of the Ace Patent case, a Supreme Court decision, to which reference was made, by applying the principle set forth in the Ace patent case to the case at bar, it will be readily seen early, in amending claim 31, now claim 4, through the insertion of the words "at the point of contact of the rollers," this is the vital part of the argument, as I gather it, "abandoned any exclusive right to a combination employing rollers which were not in contact"; without passing it off with a shrug and a smile, what is the answer to it? Very often we smile and we shrug, but I would like to hear more eloquence about that.

Mr. Trabucco: That is one of the points. There are two points on claim 4, and while——

The Court: One is the cutters and one is the contact.

Mr. Trabucco: That is right.

The Court: Two points.

Mr. Trabucco: That is correct: I want to correct my statement. I see from this copy of this judgment, costs were given plaintiff.

The Court: I think the whole discussion is immaterial, because whatever conduct the co-defendant engaged in wouldn't be binding on this defendant and *res adjudicata* with respect to any issues. [107]

Mr. Trabucco: That machine, by the way, has not been proven here, there is no contract shown,

and furthermore it was manufactured more than six years ago, so there couldn't be any infringement either.

The Court: As I gather it from the argument made, it was only after some period of time had elapsed and after the examiner had raised certain objections, and after the amendment as to the quoted language to which reference was made, that the examiner finally approved as to claim 4, isn't that correct?

Mr. Trabucco: That is correct.

The Court: What is your answer to that, Mr. Franklin?

Mr. Franklin: The answer to it is that the rollers of the defendant's device are exactly the way they are shown in the drawing. The rollers do not come actually in contact. They couldn't, because the knives are raised up a little bit above.

The Court: I am guided by the English language. I am not going to suppose anything. I have to read the mother tongue as it is written.

Mr. Franklin: That is true.

The Court: Isn't that correct?

Mr. Trabucco: That is correct, your Honor, you have to.

The Court: I am dealing here in very circumscribed limitations. I can't conjecture, suppose, surmise, or otherwise. [108]

Mr. Franklin: But the patent claim must be read in the light of the drawing and in the specification, too. You can't read a patent literally, according to the English language, by certain terms

that have definite meanings in the patent law. That point of contact, as I pointed out before, is where these rollers come nearest together, and that is the way it is shown on the drawing, and it has to be that way in order to operate. That is not a very particularly well expressed thing, there, but that that is really the meaning of it. It couldn't mean anything else. If it did come into contact, actual contact, of course the ravioli wouldn't go through.

Now, these machines are built, and the drawings really show a slight space, that is, a depth of the cutting, depth of the knives, so that the knives can cut the dough. And it is the same way as shown in the defendant's roller, and they have the margins between the molds, so that you can get a margin around the edges of the ravioli. So that is exactly the same thing, and the patent is entitled to a liberal construction, because it really is a pioneer patent.

The Court: Do you regard it a pioneer patent, in view of the Holmes patent? Have you read the Holmes?

Mr. Franklin: Yes.

The Court: Are you familiar with the Holmes?

Mr. Franklin: Yes.

The Court: Do you regard this as pioneer in the light [109] of that?

Mr. Franklin: I do, yes, because the Holmes patent does not make ravioli and there is a feature in the Barili patent that putting those margins around the edges of the ravioli, that is not in the Holmes patent, and the Holmes patent, there is no anticipation of the Barili patent.

The Court: What do you mean by the sealing of the edges?

Mr. Franklin: Yes, the margin. That is shown particularly in Figs. 2 and 3 of the Barili patent. You have got to have that margin around to seal them tightly together to keep that filling from coming out.

The Court: Sort of a fluid edge?

Mr. Franklin: Well, compressed edge. Two **slabs of dough** are brought down together around the filling and there must be a substantial margin there.

The Court: Look in the Holmes claim and I think you will find some comparable reference.

Mr. Franklin: No, there is nothing.

The Court: You are quite sure of that? I thought I saw something in that.

Mr. Franklin: You see, in the drawings of the Holmes patent, two semi-circular tubular members that come together at the edges. There is no margin on there at all, absolutely absent from that patent. As for this Evans patent, there is no filling. They just cut up little square cakes, no [110] margins, no filling at all. I don't see what relevance they have to the patent at all in suit. And as for the Oleri patent, that is just one roller there and is not an automatic machine. It doesn't have the elements of claim 4, which gives the Barili patent the character of invention of an automatic stuffed pastry machine from which ravioli may be made. And I think these prior patents are very far wide of the mark.

The Court: You say as to claim 4, the language used with respect to the point of contact of the rollers is unfortunate language. You didn't express yourself as unfortunate language, but you are not entirely satisfied with the language, are you? You might have used more apt language.

Mr. Franklin: I would say at the point where the rollers come nearest together.

The Court: That fact that you may have used that language, nevertheless the language is as we must read it there, isn't that correct?

Mr. Franklin: I would say that language must be interpreted in the light of the drawings and specifications of the patent. I don't think that language is used in the specification.

The Court: The reason I ask repeatedly on this phase is because Mr. Trabucco has made considerable point of that, isn't that correct? [111]

Mr. Trabucco: Yes, your Honor.

Mr. Franklin: I don't think that is any point, at all, because we have to give the language a reasonable construction, to be read in accordance with the mechanical construction, and the showing, and the disclosure by the drawings and by the specification. You have to read the patent from the four corners and not merely by some inapt statement picking one claim and invalidating the whole patent.

The Court: Advancing somewhat beyond this immediate discussion, let's assume that over a period of many months the claim had been before the examiner, and it was, as Mr. Trabucco points out, the allowance was predicted on the incorporation of that language, then what is your answer?

Mr. Franklin: I would say that the examiner didn't consider that there was a point of contact, actual physical contact, of the rollers, because these examiners are engineers. They read the English language in accordance with their engineering knowledge and the prior art. And the drawings, certainly every examiner can read a drawing. There is Fig. 2. It shows that the rollers are not in actual physical contact, because there wouldn't be room for the knives to cut, but they are very close. That is the point of closest contact where those annular cutters do come in contact with the surface of the other, to cut the ravioli around the edges, and I would say that the examiner considered that in the light of drawing that. [112]

The Court: Do you mind reading claim 4 just in association with that language, so I will have it in mind?

Mr. Franklin: (Reading)

"In a ravioli machine, a pair of inter-gear'd rollers, one roller having indented molds and provided with axial cutters between the said molds, the other roller being made with annular peripheral cutters adapted to be positioned between the molds of the first-named roller at the point of contact of the rollers, all the molds being spaced apart so as to provide a wide margin between the cutters and the molds, means for feeding sheets of flour paste to the rollers, and a detachable open-bottom hopper for guiding stuffing to the paste sheets on the rollers."

As for these statements of file wrappers, the tendency of decisions of higher courts of the later years have been to pay very slight regard to file wrappers, because they realize the situation—you get up before some examiner, they are rather arbitrary at times, and the client will have to amend his specification in order to overcome certain arbitrary objections, and when the patent is allowed, they will take the patent and read it according to the disclosure as to the drawings and what the specifications show, and what is the real intent of the patent as shown on its face, and they don't go back into the patent, in to the file wrapper, to any great extent. Sometimes that may be. I don't think that is a point in this case. Any engineer reading that claim would know the roller did not actually contact, because if they did, the ravioli couldn't go through, the machine wouldn't operate. We have to give a sensible construction to these patents, otherwise what is the Patent Office doing in Washington, just issuing a lot of invalid patents that don't mean anything. That is serious. People take it seriously, and because there is some little expression that isn't exactly appropriate, the whole patent must be thrown out. Patent law wasn't intended to be like that.

The Court: Mr. Trabucco, may I have your thought again on this phase of the matter? I am going to allow you, counsel, to file a memorandum. I think it is only fair in view of the fact that Mr. Trabucco has filed one with the court and I have

had the benefit of that memorandum, I should like you to hand a copy of that memorandum to counsel also.

Mr. Trabucco: Yes, I will.

There are two points in connection with claim 4, two main reasons why claim 4 does not infringe. One is we have cutters on one roller and cutters on the other roller.

The Court: I have that in mind.

Mr. Trabucco: And the other reason is that this claim is limited to a structure where the rollers come in contact. While that is not shown on the drawings, there is either one [114] thing or the other where the claim is invalid. The plaintiff must abide by the terms of the claim, and if he abides by the terms of the claim, we don't infringe on that score, but we certainly don't infringe on the position of the cutters on the rollers. That is the main point as far as this claim is concerned. There is one other point on this claim which I would like to discuss. The plaintiff, as I stated before, is in more or less of a dilemma. If he contends the claim is valid, we do not infringe, because we don't use the structure claimed, namely, the rollers which come in contact, and if he contends that that is not to be considered, the claim must be considered invalid, because it does not read on the showing in the specification or on the drawings. In other words, he does not show on the drawings or describe in the specification the two rollers in contact, and if they are not in contact they do not support the claim. There are decisions on

that point, too. So he is in a dilemma here. The claim is invalid or we do not infringe one or the other.

Claim 4 is invalid for still another reason. It specifies at point of contact of the rollers. I am arguing that the claim is invalid. The rollers do not contact with each other, but rather they are spaced apart, as clearly shown on the patent drawings. A claim which improperly describes the relationship of the elements of a claimed combination is invalid. Claim 4 is fatally defective since it does not read [115] on the disclosure. The following decisions are controlling on this point:

In re: McFarren, 121 Fed. (2d) 468. The court said:

“The sole question here is whether or not appellant discloses in the instant application the elements of the claims at bar. We cannot ignore definite limitations, regardless of the fact that they may or may not lend patentability to the claims.”

Atherton vs. Payne, 54 Fed. (2d) 821, the court said:

“It is elementary that appellants’ disclosure must support the claims and that where positive limitations are set out in the claims he may not reply upon other patents or knowledge of those skilled in the art to supply the omissions in his own disclosure. It is too clear for argument that appellants’ disclosure does not support the claims before us. Since Atherton defi-

nately limited his claims to contact points on the stem and Payne's disclosure does not read upon the limitation, it follows that, in our opinion, Payne may not make the claim which constitutes the count in issue."

In other words, the drawings show the roller out of contact, and the claim says they are in contact. The claim cannot read on the drawings, because the drawings do not show that structure. Under these decisions, definitely the claim is invalid. [116]

The Court: The matter will stand submitted. You may have an opportunity to file a short memorandum on each side, and Mr. Trabucco will hand you a copy, I assume, of his memorandum. You are to open and Mr. Trabucco will answer, and you will have time to close.

Mr. Trabucco: I will just answer Mr. Franklin.

The Court: You may have a copy of that brief of Mr. Trabucco's.

Mr. Franklin: How many days may I have, your Honor?

The Court: Will ten days be sufficient for you?

Mr. Franklin: I would like to have fifteen if I may.

The Court: Fifteen days. Similarly, fifteen and ten to answer. Fifteen, fifteen, and ten.

Mr. Trabucco: Yes, your Honor.

The Court: And if you desire additional time, the court will provide you with additional time. I realize that the burden on lawyers is sometimes great.

Certificate of Reporter

I, Randolph W. Halbert, official reporter, certify that the foregoing 117 page is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting the best of my ability. [117]

DEFENDANTS' EXHIBIT C

Excerpt from file wrapper of United States Patent Office in the matter of the Letters Patent of Arthur E. H. Barili, Number 1,844,142, granted February 9, 1932, for Improvement in Stuffed Pastry Machines.

* * * * *

In The United States Patent Office

[Stamped]: Mail Room U. S. Patent Office Dec. 12, 1927. Patent Office Div. 55 Dec. 13, 1927.

Arthur E. H. Barili; Stuffed Pastry Machine; Filed Feb. 19, 1927; Ser. No. 169480. Div. 55, Room 102.

Honorable Commissioner of Patents,
Sir:

* * * * *

Defendants' Exhibit C—(Continued)

Remarks

The Office letter of Sept. 9th has been carefully considered and the reference, Holmes, of record, has been examined.

While it is true that Holmes, on page 3, 3d paragraph, refers to a projection and indentation of the rollers of Fig. 11, it is not thought that this feature was by him fully reduced to practice. He seems merely vaguely to suggest that creases may be made in the "sticks" without sufficiently showing, explaining or claiming how this may be done. His projection and indentation would only produce a fold in the paste. He does not mention cutting the sticks in pieces, but apparently only intends to indicate the places where the cuts are to be made.

Furthermore, Holmes shows no wide margins surrounding the stuffed portion of his "envelope." It is essential that a substantial margin completely surrounds the stuffed portion of applicant's squares, or the shell will come open.

The claims have been revised to bring out these features more clearly and they are thought to be allowable in view of the reference presented.

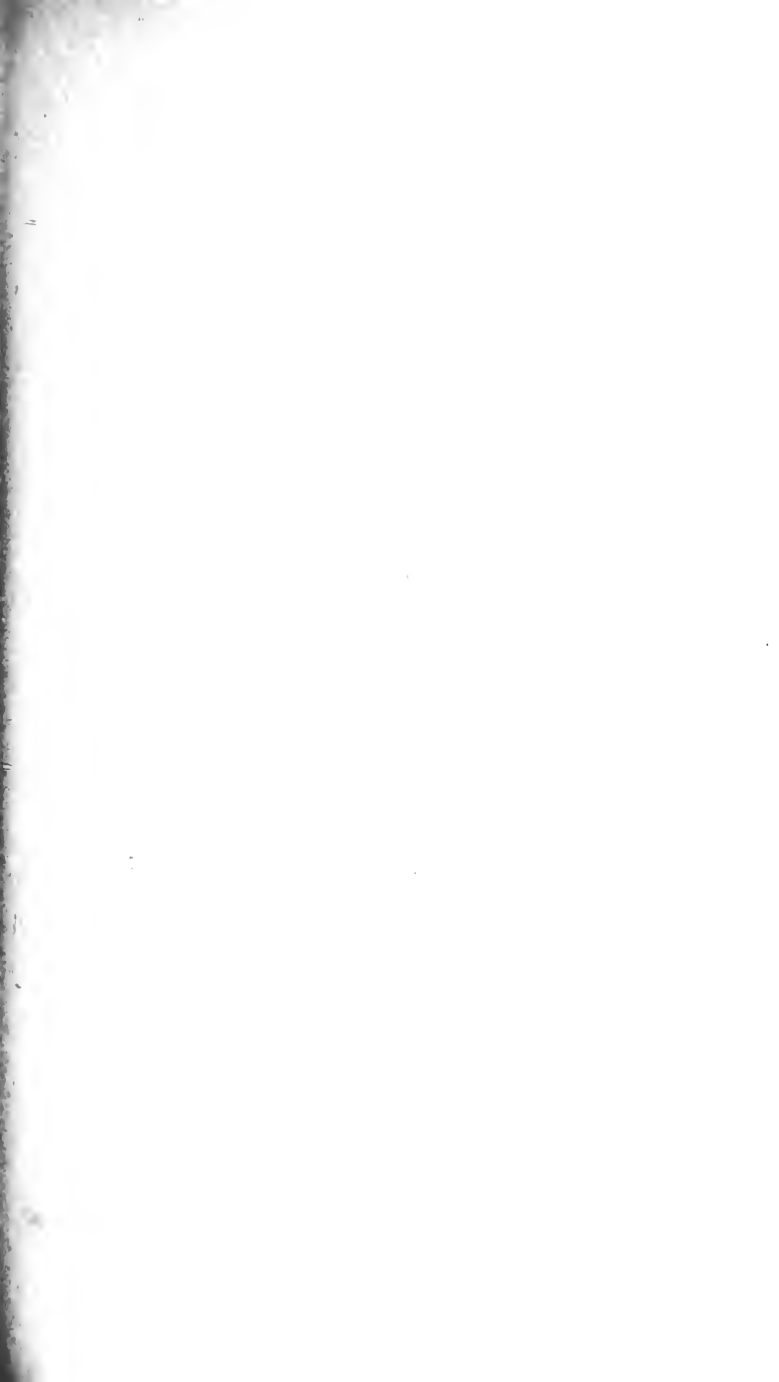
Respectfully submitted,

/s/ OLIVER O. MARTIN,

Attorney for Applicant.

Los Angeles, Calif. Dec. 7th, 1927.







ST 27 23
 SEP 11 1927

A. E. H. Barili)
 Stuffed Pastry Machine)
 Filed Feb. 19, 1927) Div. 55, Room 102.
 Ser. No. 169480)

Hon. Commissioner of Patents,

Sir:

This is responsive to the Office letter of Aug. 14, 1928, in the above named application.

On the file wrapper please change the attorneys address to read; 426 So. Spring Street.

Cancel the claims and substitute the following:

15. In a ^{modified} ~~stuffed~~ pastry machine, a pair of inter-gearred rollers, means forming two sheets of paste and carrying said sheets to said rollers, means ^{for} ~~feeding~~ ^{for guiding} stuffing to the sheets on the rollers, a plurality of annular knives projecting from the periphery of one of said rollers, and a plurality of knives axially mounted on the periphery of the other roller, said knives of a length to fit between said annular knives, all the knives combining to cut the stuffed paste into squares ^{and a scraper between said annular knives} while passing through said rollers.

16. In a stuffed pastry machine, a pair of inter-gearred rollers, means forming and carrying to said rollers two sheets of paste, means feeding stuffing to the sheets on said rollers, annular crimped knives mounted to project from the periphery of one of said rollers, axially directed crimped knives mounted to project from the periphery of the other roller, the latter knives being of a length to fit between said annular knives, all the knives combining to cut the stuffed paste into squares while passing through the rollers.

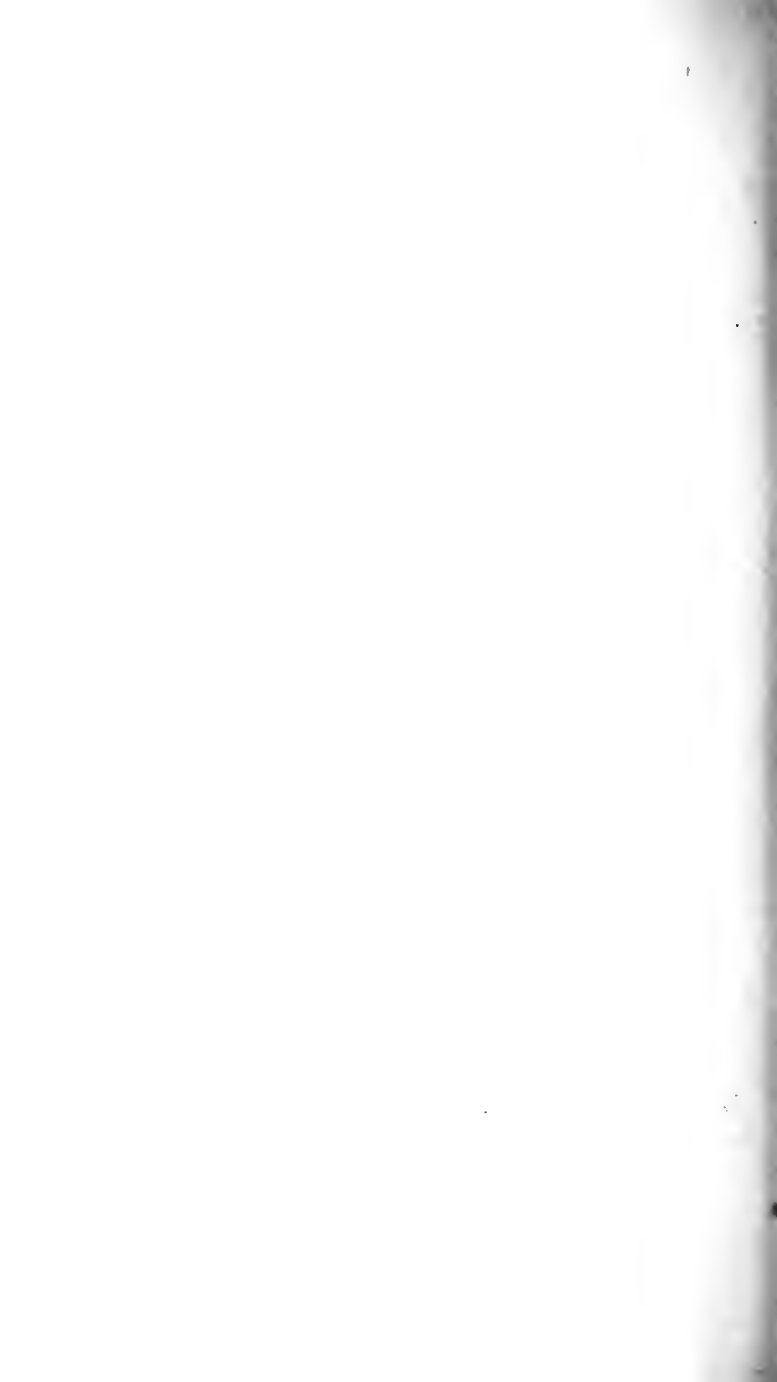


17. In a ^{ravioli} ~~stuffed pastry~~ machine, a pair of inter-
geared rollers, means ^{for} forming and feeding sheets of paste
to said rollers, an open bottom hopper ^{above} said rollers
and filled with stuffing resting on the paste sheets pas-
sing over and between the rollers, and knives mounted on the
periphery of the rollers to cut the stuffed paste into squar-
es while passing between the rollers.

18. In a ^{ravioli} ~~stuffed pastry~~ machine, a pair of inter-
geared rollers, means ^{for} forming and feeding sheets of paste to
said rollers, an open bottom hopper above said rollers and
filled with stuffing resting on the paste sheets passing over
the rollers, means pressing down on the stuffing in the hop-
per, and crimped knives mounted on the periphery of the rol-
lers to cut the stuffed paste into squares while passing be-
tween the said rollers.

19. In a ~~stuffed pastry~~ machine a form roller having
peripheral molds, a second roller intergeared with the for-
mer, means forming and feeding sheets of paste to said rollers
an open bottom stuffing hopper above said rollers, the stuf-
fing in the hopper resting on the sheets of paste passing over
said rollers, means pressing down on the stuffing in the hop-
per so as to force paste into said molds, and means mounted
on the periphery of the rollers to cut the stuffed paste into
squares while passing between the rollers.

20. In a ^{ravioli} ~~stuffed pastry~~ machine, a pair of form rol-
lers, means ^{for} forming and feeding sheets of paste to said rol-
lers, an open bottom hopper ^{capable of guiding stuffing to the paste sheet} above said rollers, and filled with
stuffing resting on the paste sheets passing over said rol-
lers, the bottom edge of said hopper being shaped to conform
to the contour of the rollers in order to confine the stuffing
within the hopper, and knives on the rollers cutting the stu-
fed paste into squares while passing between the rollers.



21. In a ~~stuffed pastry~~^{ravioli} machine, a pair of intergearing rollers provided with indented molds and having annular and axial cutters separating said molds, there remaining a substantial peripheral margin between the cutters and molds, means feeding paste insheets to said rollers, an open bottom hopper above the rollers, ~~and filled with stuffing resting upon the sheets of paste on the rollers,~~^{for supporting stuffing capable of a weight insertable in and loosely fitting said hopper} means ~~pressing the stuffing into said molds~~ the said cutters combining to cut the stuffed paste into pieces while passing between said rollers.

22. In a ~~stuffed pastry~~^{ravioli} machine, paste tables, series of rollers, ~~forming~~^{for} paste from said tables into sheets, a pair of intergearing rollers ~~receiving~~^{for} the paste sheets from said series of rollers, said intergearing rollers having peripheral molds and provided with crimped knives between said molds to cut the sheets into squares as the pass between the rollers, means ~~holding~~^{for} a mass of stuffing pressing against said sheets of paste as they pass between said rollers, means ~~carrying~~^{for} receptacles for the squares falling from said rollers, and means ~~feeding~~^{for} said carrying means forward step by step into the path of the squares falling from the rollers.

23. In a ~~stuffed pastry~~^{ravioli} machine, a pair of intergearing rollers, means ~~forming~~^{for} and feeding sheets of paste to said rollers, an open bottom hopper above said rollers, ~~and filled with stuffing resting on the paste sheets passing over and between the rollers, knives mounted on the periphery of the rollers to cut the stuffed paste into squares as it passes between the rollers, and means carrying receptacles forward step by step into the path of said squares, said means~~^{capable of holding} timed to permit a predetermined number of squares to fall into each receptacle.



24. In a ~~stuffed~~ ^{annular} ~~pastry~~ machine, a pair of rollers provided with peripheral molds and having knives axially and annularly mounted between said molds, means feeding sheets of paste over and between said ~~molds~~ ^{rollers}, an open bottom hopper above said rollers, ~~and filled with~~ ^{capable of holding} stuffing, the bottom edge of said hopper being shaped to conform to the contour of the rollers, a weight ^{for} pressing the stuffing against said sheets, the said knives cutting the stuffed paste sheets into pieces as they pass between the rollers, means ^{for} carrying receptacles for the pieces falling from the rollers, and means ^{for} guiding the pieces into said receptacles.


25. In a stuffed pastry machine, a pair of intergearing rollers, one of said rollers having equidistant annular knives touching the periphery of the opposed roller, the latter being provided with peripheral molds and having axially directed knives between said molds of a length to fit between said annular knives, said knives touching the periphery of the first named roller.

B' 1 26. In a ~~stuffed~~ ^{annular} ~~pastry~~ machine, a cutting roller comprising a plurality of cylindrical sections and circular knives of a larger diameter between said sections; in combination with a second roller comprising a series of cylindrical sections having convex annular beveled edges and a series of cylindrical discs ^{fitting} ~~placed~~ between said sections, ~~said discs having concave annular beveled edges fitting the edges of said sections,~~ the periphery of said discs having transverse grooves the edges of which are beveled to correspond with the annular convex bevels of the roller, and axial cutters seated between said grooves and fitting between the circular knives of the first named roller.



REMARKS.

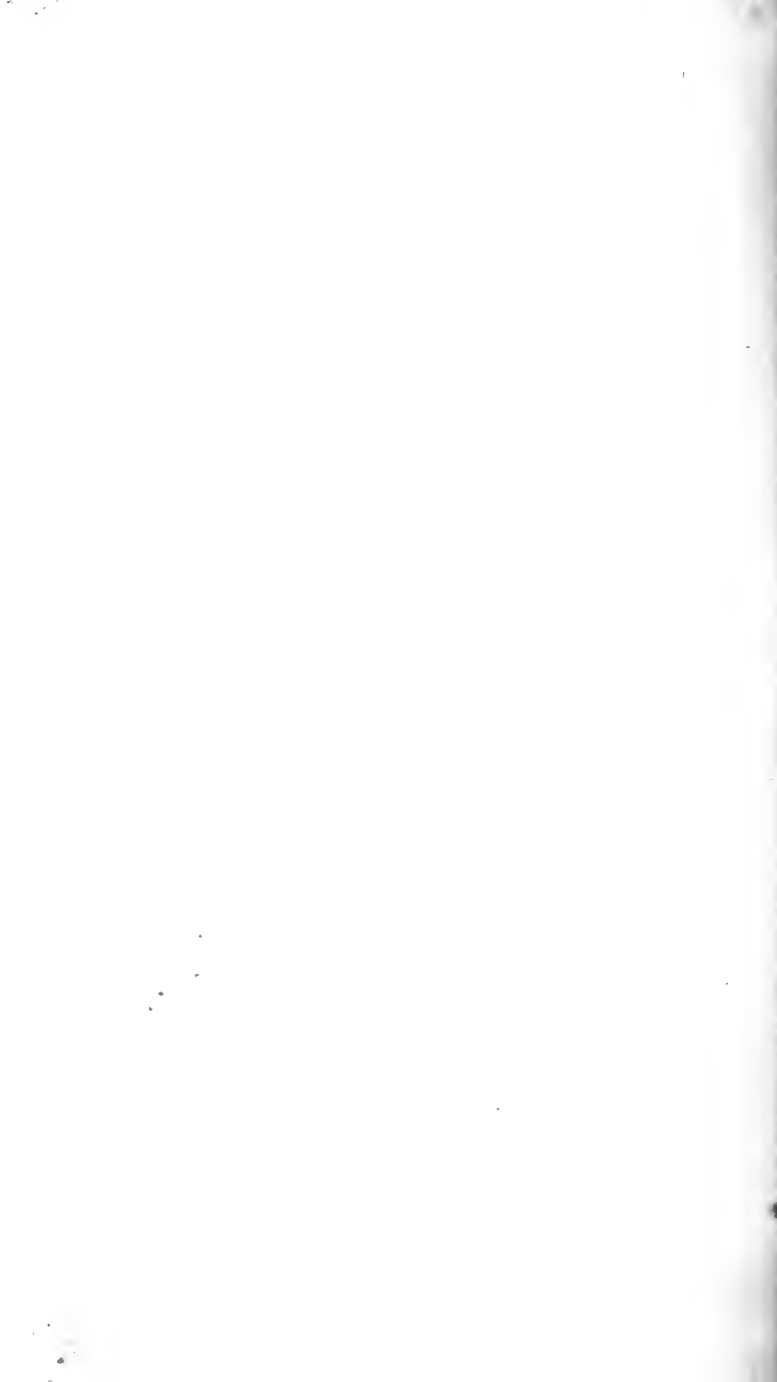
The claims have been rewritten in order to meet the objections properly made by the Examiner. The substitute claims have been numbered in compliance with Order #2,984.

The rejection on Holmes, of record, is not thought justified. Holmes shows a ridge entering a groove.  for the purpose of marking his candy sticks for later severance, after the candy has hardened. He does not mention or show cutting means. His indentation y would soon be clogged with paste, if it were attempted to cut paste by moving his rollers e and h close together. He does not show or describe or claim cutting edges. And applicant is prepared to show, by a model made exactly in the proportions shown by Holmes, Fig. 11, that the structure of Holmes would not function successfully. Applicant was a year perfecting his rollers. Flour paste is very difficult stuff to handle because it will stick. Once the least little piece sticks, it hardens and gathers more and more. The machine must then be stopped and the paste cut out. Now applicant's machines are used in this City, at San Diego and San Francisco, every day, and turn out over 500 ravioli per minute without sticking. The combination of annular cutters on one roller is also essential, because it enables applicant to put scrapers on this roller (30, Fig.1). Without these scrapers the paste clings stubbornly to the roller, especially as the cutting edges must be crimped in order that the ravioli may not later come apart. For this reason, also, the axial cutters must be placed on the opposed roller. All this is brought out in the claims which, barring informalities, are thought allowable.

Los Angeles, Calif.
Oct. 23, 1928

Respectfully submitted, 16948

O. Martin atty for applicant.



All communications respecting this application should give the serial number, date of filing, and name of the applicant

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

March 29, 1929.

Address only
The Commissioner of Patents,
Washington, D. C.,
and not any official by name

RE/L

Please find below a communication from the EXAMINER in charge of this application.

Thomas E. Robertson
Commissioner of Patents.

Applicant: Arthur E.H. Barill,

Ser. No. 169,480,
Filed Feb. 19, 1927,
For Stuffed Pastry
Machine.

Oliver O. Martin,
426 So. Spring Street,
Los Angeles, Calif.

MAILED
MAR 29 1929

Responsive to amendment filed Oct. 27, 1928.

In view of the new claims embracing subject-matter not included in prior claims, the following references are made of record:-

Evans,	1,094,320,	Apr. 21, 1914,	107-8;
Baier,	769,932,	Sept. 13, 1904,	107-51; 57.5
Frahm,	1,487,226,	Mar. 18, 1924,	107-51; 57.5

Claim 15 is rejected on Holmes of record, in view of Evans (See Figs. 3 and 4). To make the cutter of Holmes, with one roller carrying annular cutters and the other axial cutters as suggested by Evans, is not considered invention.

Claim 26 is rejected like claim 15. The use of crimped cutting elements is old, as shown by Baier or Frahm.

Claims 17-24 are rejected as being drawn to an aggregation, since they include the stuffing as part of the combination. The stuffing is not an element in the structure and should not be so claimed. Certain of these claims also include the dough sheets as elements.

Claims 17-24 are further objectionable, since they claim the machine in operation. This objection may be eliminated by claiming "means for forming", and "means for feeding" instead of "means forming", etc.

Claim 25 is rejected as not patentable over Evans.

Claim 26 is rejected as inaccurate, since it does not appear that sections 32 and 33 have concave annular beveled edges.

169480 27



169480.

-2-

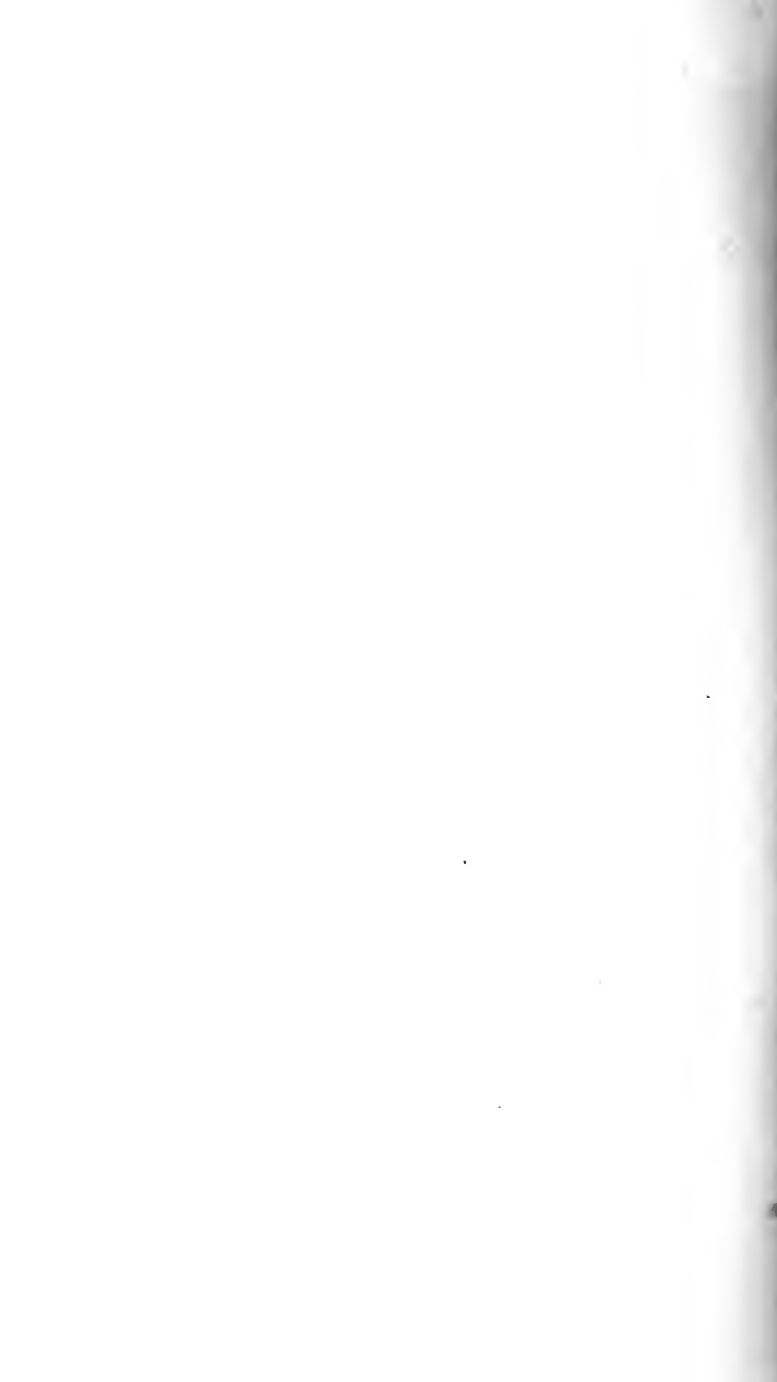
This bevel is only on the projections and not completely around the cylindrical disc. If corrected for this inaccuracy, the claim may be allowed.

R.M.

Robert P. Owen
Examiner.

169480

28



IN THE UNITED STATES PATENT OFFICE



A. E. H. BARILLI)
Staffed Pastry Machine (Div. 55, Room 102.
Filed Feb. 19, 1927)
Ser. No. 169,480 (

Honorable Commissioner of Patents,

Sir:

In the above cited application please enter the following amendment:

Cancel claims 16, 19 and 25.

In the remaining claims, line 1, for "stuffed pastry" substitute --- ravioli ---

Claims 15, 17, 18, 20, 23, line 2, after "means" insert --- for ---

Claim 15, line 3, strike out "feeding" and substitute --- for guiding --- ; end of the claim, before " " insert ---, and a scraper between said annular knives -----

Claim 17, strike out "above said rollers and filled with stuffing resting on the paste sheets passing over and between the" and substitute --- covering substantially the two converging top quarter sections of said rollers and capable of guiding stuffing to the paste covered

Claim 18, strike out the subject matter of lines four and five and substitute --- capable of guiding stuffing to the paste covered rollers, a weight insert-able in and loosely fitting said ---

Claim 20, lines 3 and 4, strike out "and filled with stuffing resting on the paste sheets passing over" and substitute --- capable of guiding stuffing to the paste sheets on ---



Claim 21, line 6, for "and filled with" stuffing
substitute ----- for supporting stuffing capable of --
same claim, lines 7 and 8, for "means pressing the
stuffing into said molds" substitute --- a weight in-
sertable in and loosely fitting said hopper ---

Claim 22, line 2, before "forming" insert
---- for ---, same claim, line 3, before "receiving"
insert --- for ---, line 7, same claim, before "holding"
insert --- for ---; and line 8 and 10, after "means"
insert ---- for ---.

Claim 23, lines 3 and 4, for "and filled
with" substitute --- capable of holding ---, line 7,
same claim, after "means" insert --- for ---

Claim 24, line 4, for "molds" substitute
--- rollers ---; line 5, same claim, for "and filled
with" substitute --- capable of holding ---; line 7,
after "weight" and lines 9 and 10, after "means"
insert --- for ---.

Claim 26, line 6, for "placed," write --- fit-
ting ---; same claim, lines 6 and 7, and 8, strike out
"said discs having concave annular beveled edges fitting
the edges of said sections,"



Defendants' Exhibit C—(Continued)

Remarks

The suggestion by the Office that the substitution of the drums of Evans, of record, for the rollers h, e of Holmes may be effected by anyone versed in the art, and that thereby a ravioli machine, such as claimed by applicant, may be produced, is herein considered.

Holmes shows two upper rollers, h, and two lower rollers, e, stating that the four rollers are necessary in order to feed the paste forward. He also states, that he puts fine grooves (mills) in the surface of the rollers d, e, and h in order to feed the paste.

Whether Holmes ever built a paste rolling and forming machine is not known to applicant. But three years of ravioli machine building has taught applicant that such arrangement is inoperative in a ravioli machine. The structure of Holmes would in a moment become a mess of paste and filling. Applicants rollers are of steel, highly polished. And in addition scrapers are used, as indicated at 30. Even so the paste must be of a certain kind of flour and very firm and dry, in order not to stick. The reason the paste does not stick within the molds 11^a is explained below.

The filling device of Holmes will not work in a machine for ravioli. A pressure great enough to force ravioli stuffing through his "ducts" or "conduits" would burst the device. Ravioli stuffing must be quite dry, or it would run out in cooking,

Defendants' Exhibit C—(Continued)

even with the wide margins applicant claims as absolutely essential. The foregoing can be proved by demonstration.

In applicant's device the weight 60 is not depended upon to press the stuffing and the paste into the molds of the form roller. The function of the weight is to settle the stuffing in the hopper. Without the weight it would remain suspended within the hopper. It is important to note, that the hopper covers a large area of paste. It is the frictional action of the forward moving paste which carries a sufficient quantity of stuffing into the groove between the two rollers (see page 3, line 24 of the specification). It is not the depth of the molds but the plasticity of the stuffing which determines the amount that sinks into the molds. For this reason applicant is free to make the molds deeper than the filled paste, with the advantage that the ravioli does not reach the bottom and so does not stick in the mold. Some air also remains in the mold and this air serves as a cushion, being compressed, which assists in expelling the ravioli.

Such ravioli stuffing as could be forced through the device of Holmes to his rollers e would rise in the space between the rollers h and roll off the machine. If the "drums" of Evans then be substituted, the paste would stick in and fill the grooves of the grooved drum, and any stuffing that might be forced through the "ducts" would roll off the machine.

Defendants' Exhibit C—(Continued)

Applicant claims the combination with his rollers of his special hopper, and this combination is not disturbed by the introduction of Evans, who shows neither paste sheets nor hopper. Holmes, of course, never contemplated delivering his confectionary sticks in short pieces. It may be that, with some material, he could run a continuous stream, but his combination would never make square ravioli.

The device of Holmes, as a ravioli machine can be proved inoperative, and an inoperative device is no reference. Even although, in the combination of Holmes and Evans just described, some imperfect pieces should drop out, such pieces would open up the moment the paste began to harden, and they would fall apart in cooking, if not before, because no wide flat marginal rims were present to hold them together. The hopper is furthermore a new element in the combination claimed by applicant, as no reference has been presented anticipating it.

When this application was first prepared for filing, the writer was not very familiar with ravioli manufacture. The draftsman made a sketch for the structure and from this the application was drawn up. The above described conditions and features have been revealed to the writer from time to time. For this reason it is suggested that the specification be rewritten in order to enable those versed in the art to build an operative structure upon perusal of this specification, and permission to do so is requested.

Defendants' Exhibit C—(Continued)

As the annular and axial means of cutting the stuffed paste into squares appeared in the original claims it is thought, that much time and expense might have been saved, had the reference, Evans, been cited in the first instance. As it is, the full co-operation of the Office is most earnestly requested, in order that a clear issue may be reached within a reasonable time.

Respectfully submitted,

/s/ O. O. MARTIN,

Attorney for Applicant.

Los Angeles, California, April 6, 1929.

[Letterhead Dept. of Commerce, Patent Office]

August 15, 1929.

Applicant: Arthur E. H. Barili

Ser. No. 169,480

Filed Feb. 19, 1927

For Stuffed Pastry Machine

[Stamped]: Mailed Aug. 15, 1920.

Oliver O. Martin,
426 South Spring St.,
Los Angeles, Calif.

Responsive to amendment filed April 15, 1929.

The following references are added to the record:

Stenzy	775,152	Nov. 15, 1904	107-22
Whitton	1,115,758	Nov. 3, 1914	226-2
(Brit.) Burns	181,567	June 22, 1922	226-104

Sheet 1

Defendants' Exhibit C—(Continued)

Numeral 30 is used to indicate two different elements, namely, the scraper and the outside members of the roller 11. On page 3, line 12 of the specification, it is thought the first reference numeral "14" of the expression "annular cutters 14-14" should be 13.

Claim 15 is again rejected on the references and for the reasons of record. It is again indicated that (see Fig. 4 of Evans) the elements d are the annular cutters on one roller, while the elements c are the axial cutters on the other roller which fit in between the annular cutters of the former. These rollers x and 7 could readily be substituted for the rollers e-e of Holmes' machine. To place scrapers between the annular knives is suggested by Stenzy.

Claims 17, 18, 20 and 21 are rejected on Holmes with Baier and Evans. Holmes and Evans are used in the same respect here as in the rejection of claim 15. It is the opinion of the examiner that an artist at the trade could readily adapt the hopper of Holmes to be used for dispensing ravioli in that if it was seen that the filling material was not feeding properly, a larger aperture could be made in the bottom of the hopper and if the material were also leaking out from under and to the outside of the hopper aperture, it would only be logical to make the lower end of the hopper to conform to the contour of the rollers e-e of Holmes. Baier suggests a crimped annular cutter which might readily be substituted for Evan's cutter d, while

Defendants' Exhibit C—(Continued)

for the sake of uniformity it would only be reasonable to make the blades *c* of Evans also crimped. Holmes also shows a means of forcing the filling through the hopper, which might readily be operated by gravity alone.

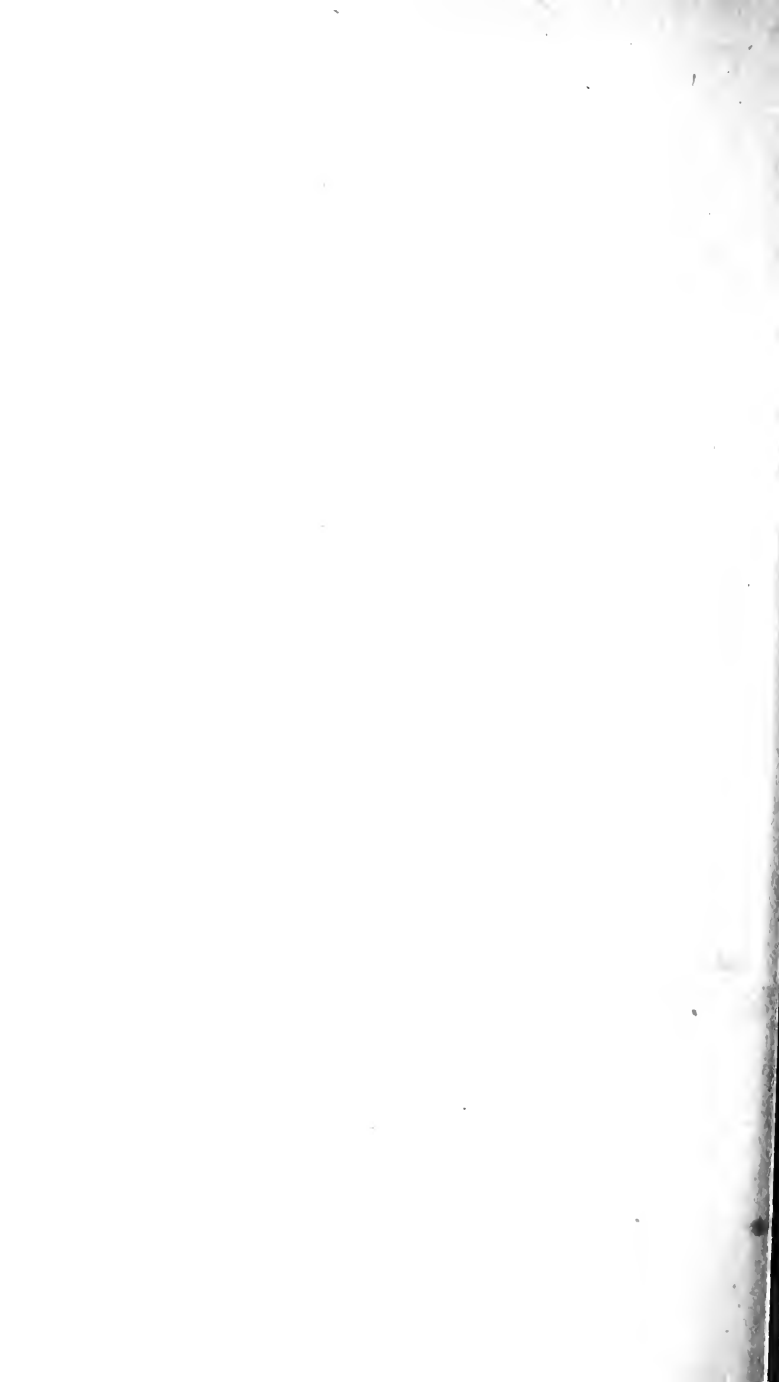
Claims 22-24 are rejected on Holmes with Baier, Whitton or Burns. Holmes and Baier are used as above, while Whitton or Burns show the intermittent filling feature for a predetermined number of articles and either of these devices might readily be substituted for the product conveyor *f* of Holmes.

Claim 26 is now deemed allowable.

/s/ [Illegible]

Examiner.





MAIL DIVISION
JAN 31 1930
U.S. PATENT OFFICE

IN THE UNITED STATES PATENT OFFICE.

9
3859 D

PATENT OFFICE
FEB 1 1930

A. E. H. Barili)
Stuffed Pastry Machine)
Filed Febr. 19, 1927)
Ser. No. 169,480)

Div. 55, Room 102.

Honorable Commissioner of Patents,

Sir: In the above named application please enter the following amendment:

Cancel Claims 15, 17, 18 and 20. Also claims 22, 23 and 24.

Add the following claim:

27. In a ravioli machine, a pair of inter-gearred rollers, means for forming and feeding sheets of flour paste to said rollers, an open bottom straight sided hopper above said rollers for the purpose of guiding stuffing to the paste sheets on said rollers, the bottom edge of said hopper being shaped to conform to the contour of the rollers, means on the rollers for cutting the stuffed paste sheets into squares, one or both of said rollers being provided with deep square molds into which the stuffed paste is free to enter, there being between said molds and the said cutting means broad peripheral margins between which the paste sheets become firmly pressed together and the stuffing expelled from these marginal portions.

REMARKS:

Applicant has taken time further to consider Evans, of record, and thorough experimenting, based upon the disclosure of Evans, prove applicant's contention, that the combination of Evans with Holmes would not operate to make stuffed ravioli squares.

The issue has been further narrowed by the cancellation of claims 15 to 20. A division has been effected by the removal of claims 22 to 24 from this application.



The added claim 27 is substantially a revision of the cancelled claim 20.

Applicant does not deny that a combination of Holmes with Evans could cut some material into squares, but insists that stuffed flour paste would stick in their rollers and the object sought would not be attained.

No reference shows applicant's peripheral molds in such combination as here considered.

Where Holmes and Whitton, of record, and other earlier patents, show and claim power operated devices for positively forcing filling material through their machines, applicant cannot concede, that it is such an obvious matter to provide a large, straight-walled, open bottom hopper and to depend wholly upon the moving paste sheets to feed the stuffing into the molds of the rollers. But he is willing to admit that, once having discovered this invention, after many months experimenting with power stuffers, his invention seems simple enough - therein resides its main value.

Applicant is not first to devise a ravioli machine. Reference is invited to Tomassini, 1,236,998, Aug. 14, 1917. This machine is used in various parts of the country, and is the only usable ravioli machine, so far as applicant is informed. Please note that Tommasini, in addition to a force feed, uses a pounder (Fig.15), having experienced the difficulty of feeding flour paste. But applicant is gradually replacing Tommasini, because it requires so much time and labor to operate and clean his device, that ravioli may be made cheaper by hand rollers.

A reconsideration and allowance is solicited.

Los Angeles, Calif.
January 27, 1930.

Respectfully submitted,

O. Martin
attorney for applicant.



Div. 55 Room 102

Paper No. 10

Address only
The Commissioner of Patents,
Washington, D. C.,
and not any official by name

J-11

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

All communications respecting
applications should give the serial
date of filing, and name of
the applicant

Apr. 18, 1930

Please find below a communication from the EXAMINER in
charge of this application.

Thomas E. Robertson
Commissioner of Patents.

Applicant: Arthur E. H. Beril

GPO 11-223

Oliver O. Martin,
426 So. Spring St.,
Los Angeles, Calif.

Ser. No. 169,480
Filed Feb. 19, 1927
For Stuffed Pastry Machine

APR 21 1930

Responsive to amendment filed Jan.

31, 1930--

Claim 21 is rejected as being in-
accurate since the hopper does not "sup-
port" the stuffing but merely encases it
and holds it from lateral dispensation.
Further the stuffing is not "capable"
of resting on the sheets of paste but
actually does rest on the sheets, provid-
ing the sheets are present at the time.

Newly submitted claim 27 is deemed
allowable as at present advised and claim
26 stands as allowed.

*CRJ
Mar 21 1930*

Thomas E. Robertson

Examiner.

169480-0





IN THE UNITED STATES PATENT OFFICE.

11
3860



Arthur E. H. Barili)
Stuffed Pastry Machine) Div. 55, Room 102.
Ser. No. 169,480)
Filed. Feb. 19, 1927)

Honorable Commissioner of Patents,

Sir:

In the above cited application please enter the following amendment:

Page 4, line 20, for the numeral "30" substitute 60

Please instruct the Office Draftsman to change the numeral "30", of Fig. 1 of the drawings, denoting the scraper, to read 60

Page 3, line 12, for "14,14" substitute 13 and 14

Cancel claim 21 and add the following claims:

3 20. In a ravioli machine, a pair of inter-gearred rollers provided with indented molds and having annular and axial cutters separating said molds, there remaining a substantial peripheral margin between the cutters and molds, means for feeding sheets of paste to said rollers, an open bottom hopper above the rollers for guiding stuffing to the paste sheets on the rollers, and a weight insertable in and loosely fitting said hopper for pressing the stuffing against the paste sheets.

301

(411)



29. In a ravioli machine, a pair of inter-gear^d rollers, one roller having indented molds and axial cutters between the molds, the other roller being made with annular peripheral cutters positioned between said molds, there being a wide margin between the cutters and molds, means for feeding sheets of flour paste to the rollers, and a detachable, open bottom hopper with vertical walls for feeding stuffing to the paste sheets on the rollers.

5 30. In a ravioli machine, a pair of inter-gear^d rollers provided with indented molds and having annular and axial cutters between said molds, there being a substantial peripheral margin between the cutters and molds, means for feeding sheets of paste to the rollers, an open bottom hopper with vertical sides above said rollers for guiding stuffing to the paste sheets on the rollers, and means for adjusting said hopper vertically to accommodate paste sheets of various thicknesses.

REMARKS.

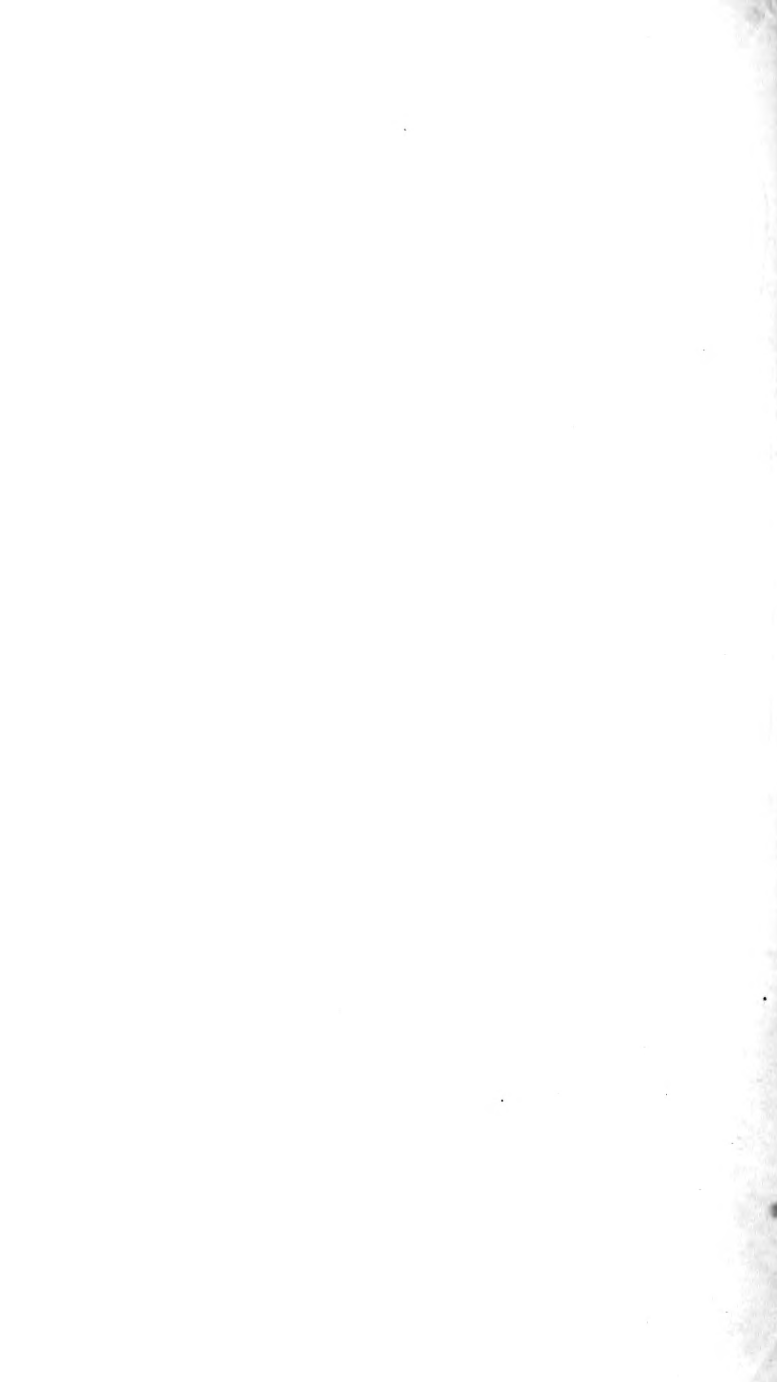
Claim 21 has been rewritten, as claim 28, in order to cure the defects pointed out by the Examiner. The two additional claims contain elements of importance in the combination now thought patentable, and not mentioned in the allowed claim 27.

The four claims now remaining in the case are thought quite necessary properly to define the invention and an allowance is requested.

Respectfully submitted,

O. Martin
attorney for applicant.

Los Angeles, California,
September 9, 1930.



5

Room 102.

Paper No. 12

Address only
Commissioner of Patents,
Washington, D. C.,
and not any official by name

Just/L.

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

All communications respecting this
application should give the serial number,
date of filing, and name of
the applicant

Please find below a communication from the EXAMINER in
charge of this application.

Thomas E. Robertson
Commissioner of Patents.

o p o 11-4022

Oliver O. Martin,
426- So. Spring Street,
Los Angeles, Calif.

Applicant: Arthur E.H.
Barill,
Ser. No. 169480
Filed Feb. 19, 1927,
For STUFFED PASTRY
MACHINE.

NOV 22 1930

Responsive to amendment filed Sept. 13, 1930.

Newly submitted claim 29 is rejected as being vague in
view of the expression in lines 3 thru 5. How can one roller
have cutters positioned between molds which are on the other
roller? When satisfactorily corrected to overcome the
above mentioned vagueness, this claim may be allowed.

Claims 26 thru 28 and 30, as at present advised and in
view of the art of record, are deemed allowable.

[Signature]
Examiner.

169480 41



MAILED
DEC 15 30
U.S. PATENT OFFICE

PATENT OFFICE
DEC 16 1930
DIV 55

Arthur E. H. Barilli)
Stuffed Pastry Machine)
Ser. No. 169,480) Div. 55, Room 102.
Fil. Feb. 19, 1927)

Honorable Commissioner of Patents,

Sir:

This is responsive to the Office letter of Nov. 22, 1930.

Cancel claim 29 and substitute:

Barilli
(71)

4 ~~3~~. In a ravioli machine, a pair of intergearing rollers, one roller having indented molds and provided with axial cutters between said molds, the other roller being made with annular peripheral cutters ^{adapted to be} positioned _{at the point of contact of the rollers} between the molds of the first named roller, all the molds being spaced apart so as to provide a wide margin between the cutters and the molds, means for feeding sheets of flour paste to the rollers, and a detachable, open bottom hopper for guiding stuffing to the paste sheets on the rollers.

Entered follows

REMARKS:

Claim 29, rewritten to cure the ambiguity pointed out by the Office and also to make it more definite in its expressions, is now thought allowable. The application is thought properly presented and an allowance is solicited.

Respectfully submitted,
O. O. Martin
attorney for applicant.

Los Angeles, California,
Dec. 10, 1930.

Address only
"The Commissioner of Patents,
Washington, D. C."
and not any official by name

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

J/S

All communications respecting
applications should give the serial
date of filing and name of
the applicant

Please find below a communication from the EXAMINER in
charge of this application.

Thomas E. Robertson
Commissioner of Patents.

GPO 11-8023

Applicant: Arthur E. Barili

Oliver O. Martin,
426 - So. Spring St.,
Los Angeles, Calif.

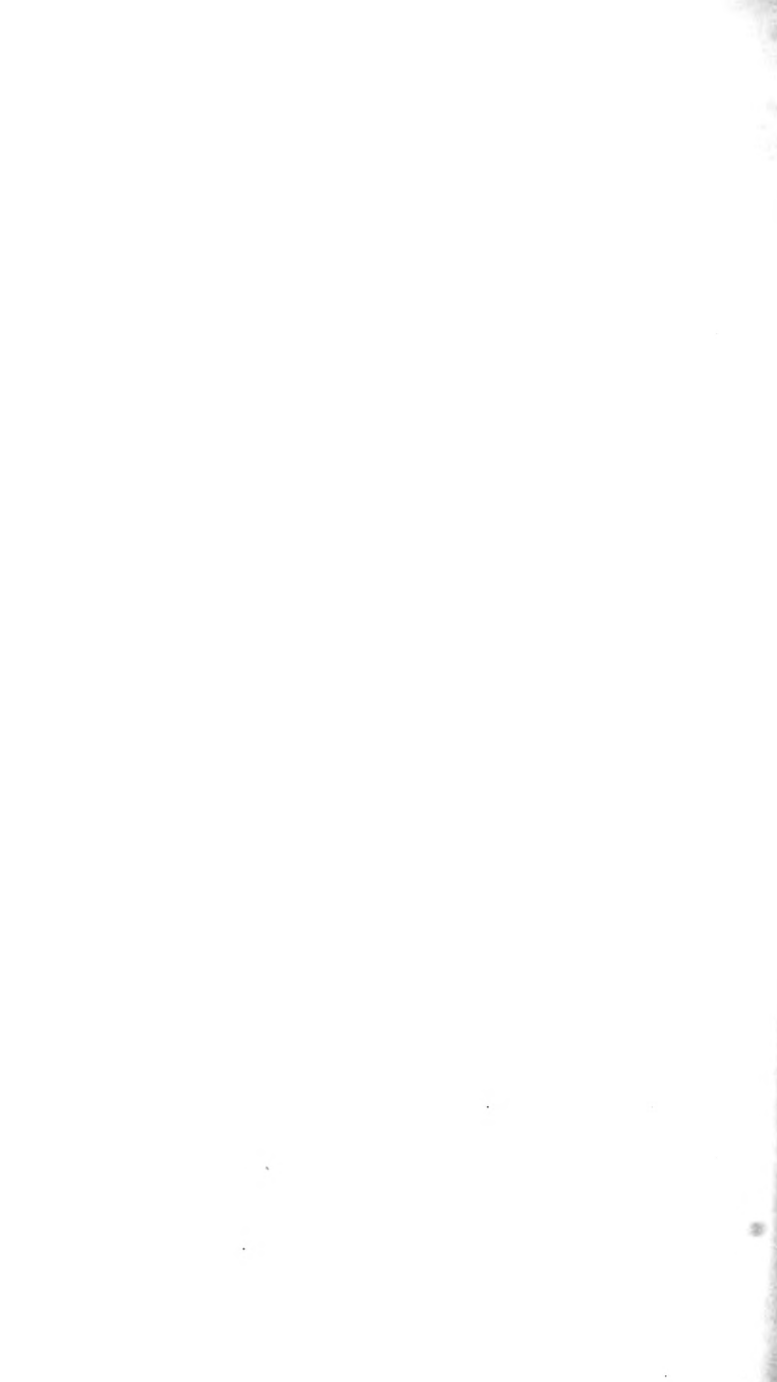
Ser. No. 169,480
Filed Feb. 19, 1927
For Stuffed Pastry
Machine.

Responsive to amendment filed December 15, 1930.

Newly submitted claim 31, substituted for former
claim 29, is rejected as was claim 29 of record. This
claim still contains the vagueness which was formerly
criticized in claim 29 of record. It is suggested
that, if the expression adapted to be were added after
the word "outters" in line 4 and the expression at the
point of contact of the rollers were added after the
word "roller" in line 5, the vagueness would be elimin-
ated and the claim would no doubt be allowable.

Claims 26 thru 28 and 30 stand as allowable.

Examiner.



IN THE UNITED STATES PATENT OFFICE

1-
9

JAN - 2 31

U.S. PATENT OFFICE
J

Arthur E. Barili)
Stuffed Pastry Machine) Div. 55, Room 102.
Febr. 19, 1927)
Ser. No. 169,480)

Honorable Commissioner of Patents,

Sir:

This is responsive to the Office letter of Dec. 16, 1930, in the above cited application.

Claim 31, line 4, after "cutters" insert

----- adapted to be -----

Same claim, line 5, after "roller" insert

---- at the point of contact of the rollers ----

REMARKS:

The suggested amendment of the rewritten claim 29 is appreciated and has been adopted. This should bring the application to an allowance, and such is solicited.

Respectfully submitted,

W. H. Martin

attorney for applicant.

Los Angeles, California,
Dec. 29, 1930.

44

169480



Div. 55 Room 102

Address only

"The Commissioner of Patents,
Washington, D. C."
and not any official by name

DEPARTMENT OF COMMERCE
J-M UNITED STATES PATENT OFFICE
WASHINGTON

Paper No. 16

All communications respecting this
application should give the serial or
date of filing, and name of
the applicant

Please find below a communication from the EXAMINER in
charge of this application.

Thomas E. Robertson
Commissioner of Patents.

Applicant: Arthur E. H. Baril

Ser. No. 169,480
Filed Feb. 19, 1927
For STUFFED PASTRY MACH

o p o 11-5023

Oliver O. Martin,
426-So. Spring St.,
Los Angeles, Calif.

MAR 2 1931

Responsive to amendment filed

Jan. 2, 1931--

Claims 26, 27, 28, 30, and 31 are
now deemed allowable but, pending a
possible interference, formal allow-
ance is withheld for a period of at least
twenty-one days.

J

Arthur E. H. Baril

Examiner.

169480 48



INTERFERENCE

Interference No. **61480**

Paper No. **17**

Name, **Arthur E. H. Barili,**

Serial No. **169,480**

Title, **Stuffed Pastry Machines,**

Filed, **Feb. 19, 1927**

Interference with **Pietro Muzio,**

DECISIONS ON MOTION

Law Examiner, Dated,

Board of Appeals, Dated,

DECISIONS ON PRIORITY

Ex'r of Interferences, *Favorable* Dated, *July 3/31*

Board of Appeals, Dated,

Court, Dated,

REMARKS:

.....
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

169480 46

This should be placed in each application or patent involved in interference in addition to the interference letters by Primary Examiner.



DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

Paper No. 18
All communications respecting this application should give the serial number of filing, and name of the applicant

PATENT OFFICE
★ APR 16 1931 ★
MAILED

Address only
The Commissioner of Patents,
Washington, D. C.
and not any other office

Please find below a communication from the EXAMINER in charge of this application

Thomas E. Robertson
Commissioner of Patents

Applicant: Arthur H.H. Barilli

Oliver O. Martin,
426 So. Spring Street,
Los Angeles, Calif.

Ser. No. 169480,
Filed Feb. 19, 1927,
For Stuffed Pastry
Machine.

The case, above referred to, is forwarded to the Examiner of Interferences because it is adjudged to interfere with others, hereafter specified. The question of priority will be determined in conformity with the Rules. The interference will be identified

as No. 61480 On or before JUN 1 - 1931

the statement demanded by rule 110 must be sealed up and filed with the subject of invention, and name of party filing it, indorsed on the envelope. The subject-matter involved in the interference is

Count 1:

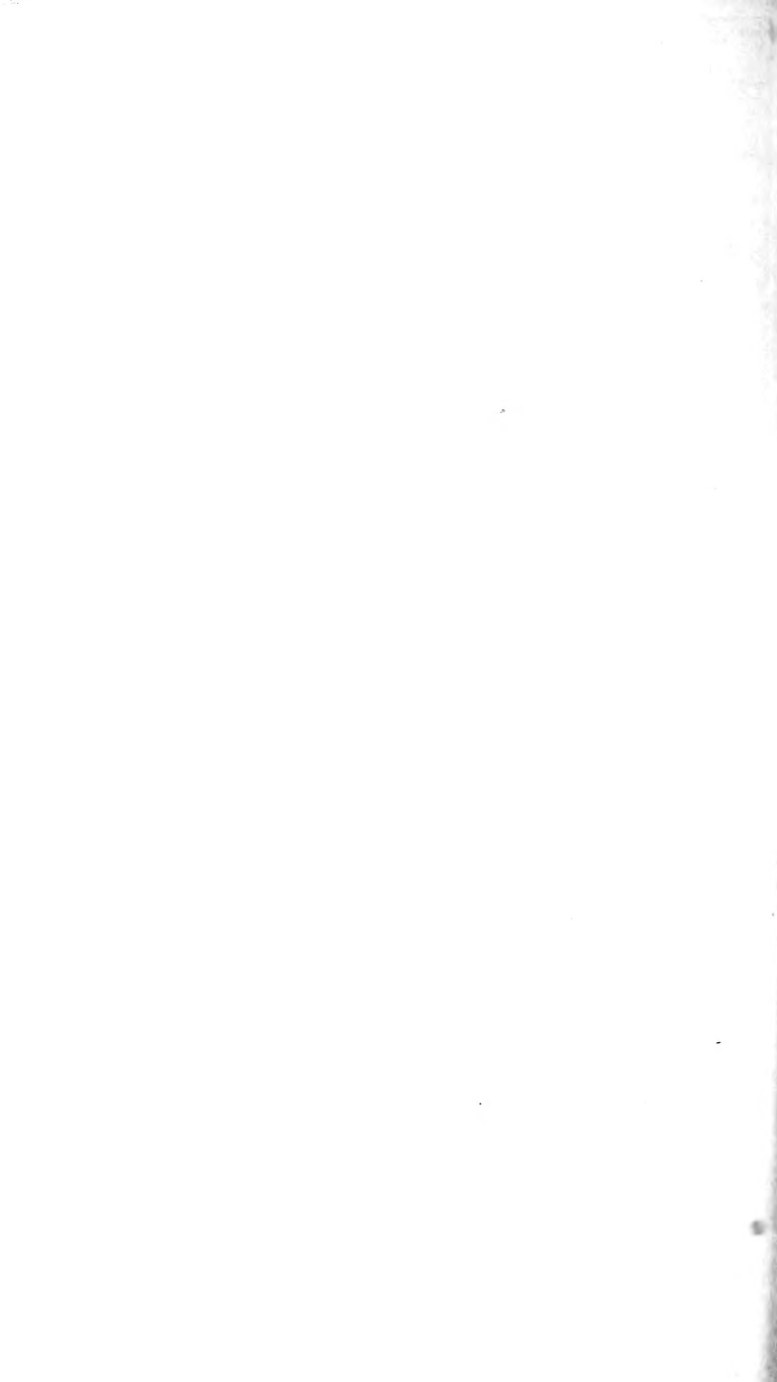
"In a ravioli machine, a pair of intergeared rollers, means for forming and feeding sheets of flour paste to said rollers, an open bottom straight sided hopper above said rollers for the purpose of guiding stuffing to the paste sheets on said rollers, the bottom edge of said hopper being shaped to conform to the contour of the rollers, means on the rollers for cutting the stuffed paste sheets into squares, one or both of said rollers being provided with deep square molds into which the stuffed paste is free to enter, there being between said molds and the said cutting means broad peripheral margins between which the paste sheets become firmly pressed together and the stuffing expelled from these marginal portions."

This interference involves your application above identified and an

Application for Apparatus for The Manufacture of Filled Paste Products, filed by Pietro Muzio, whose postoffice address is 3688- 21st. Street, San Francisco, California, whose attorney is Jas. M. Naylor, of 415 Russ Bldg., San Francisco, Calif., whose associate attorney is *L. Edward Flaherty, International Bldg.* ~~Jas. T. Norton, of the National Fire Bldg., Washington, D.C.,~~ and whose assignee is the Superba Packing Company, of San Francisco, Calif., a co-partnership.

The relation of the counts of the interference to the claim of the respective parties is as follows:- 169480 47

Count compared) Count. 1 Barilli. 27 Muzio. 16
Examined, Div.



ADDRESS ONLY
THE COMMISSIONER OF PATENTS
WASHINGTON, D. C.

Div. 55

181

Serial No. 169480

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE
WASHINGTON

Arthur E.H. Barilli,

July nine, 1931.

Your APPLICATION for a patent for an IMPROVEMENT in
Stuffed Pastry Machine,

filed Feb. 19, 1927 has been examined and ALLOWED with 5 claims.
The final fee, TWENTY-FIVE DOLLARS, WITH \$1 ADDITIONAL FOR EACH CLAIM ALLOWED IN EXCESS OF 20, must be paid not later than SIX MONTHS from the date of this present notice of allowance. If the final fee be not paid within that period, the patent will be withheld, but the application may be renewed within one year after the date of the original notice with a renewal fee of \$25 and \$1 additional for each claim in excess of 20..

The office delivers patents upon the day of their date, on which date their term begins to run. The preparation of the patent for final signing and sealing will require about four weeks, and such work will not be begun until after payment of the necessary final fee.

When the final fee is paid, there should also be sent, DISTINCTLY AND PLAINLY WRITTEN, the name of the INVENTOR, TITLE OF THE INVENTION, AND SERIAL NUMBER AS ABOVE GIVEN, DATE OF ALLOWANCE (which is the date of this circular), DATE OF FILING, and, if assigned, the NAMES OF THE ASSIGNEES.

If it is desired to have the patent issue to an ASSIGNEE OR ASSIGNEES, an assignment containing a REQUEST to that effect, together with the FEE for recording the same, must be filed in this office on or before the date of payment of the final fee.

After issue of the patent, uncertified copies of the drawings and specifications may be purchased at the price of TEN CENTS EACH. The money should accompany the order. Postage stamps will not be received.

The final fee will NOT be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office.

NOTICE.—WHEN THE NUMBER OF CLAIMS ALLOWED IS IN EXCESS OF 20, NO SUM LESS THAN \$25 PLUS \$1 ADDITIONAL FOR EACH CLAIM IN EXCESS OF TWENTY CAN BE ACCEPTED AS THE FINAL FEE.

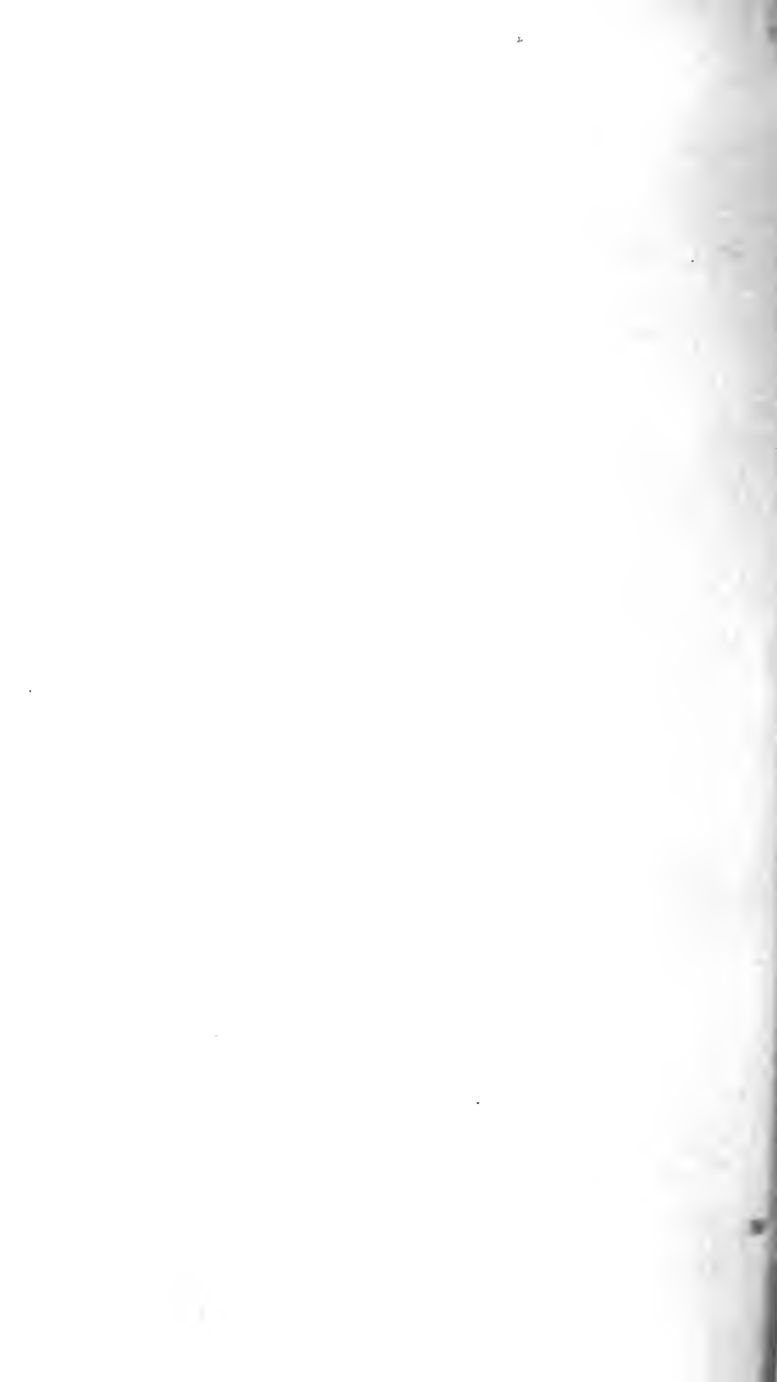
Respectfully,

Thomas E. Robertson

Commissioner of Patents.

Oliver O. Martin,
426-So. Spring St.,
Los Angeles, Calif.

169480 48



[Endorsed]: No. 11769. United States Circuit Court of Appeals for the Ninth Circuit. Achille Bianchi and Marlo Packing Corporation, Appellants, vs. Arthur E. H. Barili, Appellee and Arthur E. H. Barili, Appellant, vs. Achille Bianchi and Marlo Packing Corporation, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 24, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11769

ARTHUR E. H. BARILI,

Plaintiff,

vs.

ACHILLE BIANCHI, MARLO PACKING CORPORATION, a corporation, SUPERBA PACKING CO., LTD., a corporation, and PETE MEDA, doing business as MEDA BROS.,

Defendants.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD FOR PRINTING

Now come appellants Achille Bianchi and Marlo Packing Corporation, and through their counsel specify that they desire to adopt as their points on appeal, the Statement of Points relied upon appearing in the transcript of record.

It is also stated that these appellants desire the entire record as certified to be printed or otherwise reproduced, excepting:

1. Pages 1 to 21 inclusive and pages 45 to 54 inclusive of defendants' Exhibit C, the file wrapper and contents, Barili Patent No. 1,844,142 (in other words only pages 22 to 44 inclusive of this exhibit are to be printed);

2. Defendants' Exhibit A;
3. Defendants' Exhibit B;
4. Plaintiff's Exhibit No. 3 for identification.

ACHILLE BIANCHI and MARLO
PACKING CORPORATION,
Defendants.

By /s/ J. E. TRABUCCO,
Their Attorney.

Receipt of a copy of the within "Statement of Points on which Appellants Intend to Rely on Appeal and Designation of Parts of Record for Printing," is hereby admitted this 28th day of October, 1947.

/s/ ALAN FRANKLIN,
BOYKEN, MOHLER & BECKLEY,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 29, 1947.

[Title of Circuit Court of Appeals and Cause.]

ORDER EXHIBITS BE NOT PRINTED

To the United States Circuit Court of Appeals for
the Ninth Circuit:

For the purposes of avoiding unnecessary costs,
it is respectfully requested that the original exhibits
in the above entitled case be considered in their
original form without being reproduced.

Respectfully submitted,

/s/ J. E. TRABUCCO,

Attorney for Defendants.

So Ordered:

/s/ WILLIAM DENMAN,

Senior U. S. Circuit Judge.

[Endorsed]: Filed Oct. 29, 1947.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT, BARILI, INTENDS TO RELY ON APPEAL AND DESIGNATION OF ADDITIONAL PARTS OF RECORD

Appellant, Barili, pursuant to subdivision 6, Rule 19, hereby adopts as his Points on Appeal his Statement of Points appearing in the Transcript of Record.

Appellant, Barili, hereby designates the following portions of the record to be printed, in addition to those specified by appellants, Bianchi and Marlo Packing Corporation, in their designation, filed herein on October 29, 1947:

- (1) Page 18, from top of page to and including the word "Sir:": pages 20, 45-48, both inclusive, of Defendant's Exhibit C.
- (2) Request that Original Exhibits be Considered in Original Form and Order thereon, filed October 29, 1947.
- (3) This Statement and Designation.

Dated: October 31, 1947.

/s/ ALAN FRANKLIN,
BOYKEN, MOHLER & BECKLEY,
/s/ W. BRUCE BECKLEY,
Attorneys for Appellant, Barili.

Receipt of a copy of the foregoing Final Judgment is acknowledged this 31st day of October, 1947.

/s/ J. E. TRABUCCO,
Attorney for Appellees.

[Endorsed]: Filed Oct. 31, 1947.



No. 11769

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR E. H. BARILI,

Appellant,

vs.

ACHILLE BIANCHI and MARLO PACKING CORPORATION,

Appellees.

OPENING BRIEF FOR APPELLANT,
ARTHUR E. H. BARILI.

FILED

JAN 7 1948

PAUL P. O'BRIEN,
CLERK

ALAN FRANKLIN,

356 South Spring Street, Los Angeles 13,
Attorney for Appellant, Arthur E. H. Barili.

TOPICAL INDEX

	PAGE
Preliminary statement	1
Statement of case.....	2
Statement of points relied upon.....	4
Argument	5
Point 1	5
Point 2	5
Point 3	6
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Garretson v. Clark, 111 U. S. 120.....	6
O'Cedar Corp. v. F. W. Woolworth Co., 73 F. (2d) 366.....	2, 6

RULES

Federal Rules of Civil Procedure, Rule 53(b).....	6
---	---

STATUTES

Act of August 1, 1946, Pub. Law No. 587, 79th Cong., Sec. 4921, R. S. (35 U. S. C., Sec. 70).....	2, 4, 5, 6, 8
Act of March 3, 1911, 36 Stat. 1091.....	2
Judicial Code, Sec. 128(a) (43 Stat. L. 936, 28 U. S. C. A., Sec. 225)	2
Judicial Code, Sec. 129 (28 U. S. C., Sec. 227a).....	2

No. 11769

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARTHUR E. H. BARILI,

Appellant,

vs.

ACHILLE BIANCHI and MARLO PACKING CORPORATION,

Appellees.

**OPENING BRIEF FOR APPELLANT,
ARTHUR E. H. BARILI.**

Preliminary Statement.

This is an appeal from paragraph 5 of the Final Judgment of the United States District Court, Northern District of California, Southern Division, ordering, adjudging and decreeing that the plaintiff (appellant) shall recover no damages or loss of profit from the defendants (appellees) by reason of their infringement of Letters Patent of the plaintiff. [Tr. pp. 27-29.] The District Court has jurisdiction under the patent laws of the United States because this is a suit in equity for infringement of letters patent for an invention, as alleged in the Complaint [Tr. pp. 2-4], and particularly as alleged in paragraph VI of the Complaint. [Tr. p. 3.] The Answer denies infringement of the patent in suit and sets up the defenses

of invalidity of said patent on several grounds, and the statute of limitations. The lower court at the conclusion of the trial on March 11, 1947 [Tr. p. 48], ordered the case submitted on briefs [Tr. p. 155], and did not file its Memorandum Opinion [Tr. pp. 20-23] until later, on July 9, 1947, in which opinion the court refused to allow damages or loss of profits to the plaintiff (appellant) and the court failed to assess damages, or cause the same to be assessed, in accordance with the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70), and despite the prayer for an accounting for profits and damages in the Complaint. [Tr. p. 4.]

This Honorable Court has jurisdiction upon appeal to review the final judgment of the District Court, according to Section 128(a) of the Judicial Code, as amended (43 Stat. L. 936, 28 U. S. C. A., §225), and the Act of March 3, 1911, 36 Stat. 1091 (Judicial Code), Sec. 129 (U. S. C., Title 28, Sec. 227a).

“An order denying an accounting is appealable.”

O’Cedar Corp. v. F. W. Woolworth Co., 73 F. (2d) 366, p. 367.

Statement of Case.

This is a suit in equity for infringement of United States Letters Patent No. 1,844,142, issued to the plaintiff (appellant), Arthur E. H. Barili, February 9, 1932, for an invention in a Stuffed Pastry Machine. The Complaint prays for an accounting for profits and damages for infringement by the defendants (appellees) of said letters patent. [Tr. p. 4.]

There were two trials of the case in the lower court. The first trial was had on February 6, 1947, without

notice to the plaintiff (appellant) [Tr. pp. 7-8 and 42-43] and in the absence of the plaintiff and his counsel, and a Final Decree was entered February 7, 1947, in favor of the defendants, dismissing the Complaint, and ordering plaintiff to pay the defendants five hundred dollars (\$500.00) for costs and counsel fees. [Tr. pp. 14-15.] On March 10, 1947, the lower court granted the plaintiff's (appellant's) Motion for Relief From Judgment and To Reset for Trial, and ordered that the second trial be set for the next day on March 11, 1947. [Tr. p. 19.] On March 11, 1947, the case was again tried with the plaintiff and the defendants, and their counsel present. [Tr. p. 48.] At the conclusion of said second trial the lower court ordered that the case stand submitted and that counsel file briefs, which was done. [Tr. p. 155.] On July 9, 1947, the lower court filed its Memorandum Opinion [Tr. pp. 20-23], in which the court held Claim 4 of the patent in suit valid and infringed by the defendants, and enjoined the defendants from further infringing the plaintiff's patent, but failed to order an accounting for damages to plaintiff as prayed in the Complaint, in view of the court's refusal to allow damages to the plaintiff for said infringement, on the ground that plaintiff had failed to produce evidence of any damages at the trial, before the court had rendered a judgment of infringement of the patent in suit. On August 1, 1947, the lower court entered its Final Judgment [Tr. pp. 27-29] in accordance with its aforesaid Memorandum Opinion, and in paragraph 5 of said Judgment the lower court ordered, adjudged and decreed that plaintiff shall recover no damages or loss of profit from the defendants by reason of their infringement of said letters patent. From paragraph 5 of said Final Judgment of the lower court the plaintiff (appellant) Arthur E. H. Barili appeals to this Honorable

Court for an accounting of damages in accordance with the prayer of the Complaint [Tr. p. 4] and the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70).

Statement of Points Relied Upon.

The points asserted as errors of the trial court, upon which the appellant relies on his appeal to this Honorable Court, are [Tr. pp. 36-37] as follows:

1. In ordering the case to trial the day after setting aside a former judgment in favor of the defendants rendered on a former trial, of which plaintiff received no notice from the clerk of the court, and thereby depriving plaintiff of sufficient time to secure evidence of his damages sustained by plaintiff, by reason of the defendants' infringement of the plaintiff's patent in suit.

2. In not ordering an accounting of damages by the defendants to the plaintiff for defendants' infringement of the plaintiff's patent in suit.

3. In not awarding the plaintiff a reasonable attorney's fee in accordance with the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70), in view of the defendants' wilful infringement of the plaintiff's patent.

ARGUMENT.

Point 1.

The first trial of the case in the lower court on February 6, 1947, without notice to the plaintiff's attorney, was a surprise to him, and when he went to San Francisco from Los Angeles to present his motion on March 10, 1947, for relief from judgment and to reset for trial [Tr. p. 15], he was not prepared to try the case on its merits, or to prove *at thè trial* the damages sustained by the plaintiff by reason of the defendants' wilful infringement of the plaintiff's patent; and the order of the court setting the case for trial on March 11, 1947, the day after the hearing of said motion for relief, etc., was another surprise to the plaintiff's counsel, and he was certainly at a serious disadvantage in trying the case on such short notice. [Tr. p. 19.] Under the circumstances the plaintiff should be given an opportunity to prove his damages on an accounting.

Point 2.

At the conclusion of the trial of the case [Tr. p. 155], which covered only the issues of validity and infringement of the patent in suit, the court made no ruling or statement as to an assessment of damages, either by the court, or under the court's direction, by a master on an accounting, as required by Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70), as amended August 1, 1946, and consequently plaintiff's counsel understood that no assessment of damages would be ordered by the court *unless and until* the court rendered its judgment of infringement of the patent

in suit, as required by the statute above cited. It would be idle for the court to assess damages, or to have the same assessed until the court first determined that the patent had been infringed, and rendered its judgment accordingly. The ruling of the court in its Memorandum Opinion [Tr. p. 23] in not allowing the plaintiff damages or an assessment of damages is contrary to the evidence and contrary to law. (Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70).) The old case of *Garretson v. Clark*, 111 U. S. 120, cited by the court in its opinion, is not in point, because in that case there was an accounting and the court refused to allow damages because the evidence on the accounting was not sufficient to prove damages. In the case at bar the court refused to assess damages or cause the same to be assessed, for no valid reason whatever, and in refusing to do so the lower court is grossly in error.

“It is far better practice . . . for the court to try issues determinative of liability and merely refer matters of accounting to the master.”

O’Cedar Corp. v. F. W. Woolworth Co., 73 F. (2d) 366, p. 367.

Reference to a master in matters of account is the rule, and not the exception to the rule, in patent infringement suits in equity.

F. R. C. P., Rule 53(b).

Point 3.

In view of the wilful infringement of the plaintiff’s patent by the defendants, and particularly by the defendant, Achille Bianchi, the plaintiff should be awarded a reasonable attorney’s fee, in accordance with Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70), as amended August 1, 1946.

The defendant Bianchi has infringed the plaintiff's patent since the date of issuance of the patent. In the year 1932 the plaintiff saw the first infringing stuffed pastry machine that Superba Packing Company was using and which was built by the defendant Bianchi. [Tr. pp. 60-62 and 101.] The Superba Packing Company settled with the plaintiff for this first infringement of his patent. [Tr. pp. 103-104.] The plaintiff then saw the defendant Bianchi who agreed not to make any more of the plaintiff's machines. [Tr. p. 62.] Bianchi at that time also had two rollers at his shop, and later the plaintiff found out that Superba Packing Company was using a small infringing machine with those rollers at the San Francisco World's Fair. [Tr. pp. 62-63.] The Superba Packing Company was a defendant in this suit and a consent judgment was taken against it by the plaintiff for its infringement of the plaintiff's patent in using said small machine with said rollers made by the defendant Bianchi. [Tr. pp. 55, 56, 62-65 and 143-145.] Another infringement of the defendant Bianchi was the stuffed pastry machine which he built and sold to the Riviera Packing Company in 1939 or 1940 or thereabout according to Bianchi's testimony. [Tr. pp. 94-95.] The plaintiff sued and secured a judgment against Riviera Packing Company for its infringing use of the machine which it bought from the defendant Bianchi. [Tr. pp. 55-60 and 84-85; see Plaintiff's Exhibit 3 for Identification.] The stuffed pastry machine, Defendants' Exhibit B for Identification, was built by the defendant Bianchi and sold to the defendant Marlo Packing Corporation, which defendant used said machine for at least half a year at great profit before it was sent back to Bianchi's shop to be cleaned. [Tr. pp. 97-99, 102, 66-67 and 88-92.] The plaintiff's patented machine is an automatic mass production ma-

chine for manufacturing stuffed pastry, such as ravioli, and there is no other machine like it in California except the infringing machines made by the defendant Bianchi. We have good reason to believe that the infringing machines above enumerated are not the only infringing machines made by the defendant Bianchi. Every machine built and sold by the defendant Bianchi caused the loss of a sale by the plaintiff of one of his own patented machines and loss of royalties for the use of said machines.

Conclusion.

In conclusion it is submitted:

1. That the Judgment of the lower court should be reversed, in so far as said Judgment ordered, adjudged and decreed that the plaintiff shall recover no damages from the defendants by reason of their infringement of the patent in suit, and that the lower court be ordered to assess or caused to have assessed the damages sustained by the plaintiff by reason of the wilful infringement of the defendants and that said damages be increased pursuant to Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70)', as amended August 1, 1946.

2. That the lower court be ordered to award a reasonable attorney's fee to the plaintiff, Arthur E. H. Barili, pursuant to Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70), as amended August 1, 1946, in view of the aggravated case of infringement of the defendants, and the damages suffered by the plaintiff by reason of such infringement.

Respectfully submitted,

ALAN FRANKLIN,

Attorney for Appellant, Arthur E. H. Barili.

No. 11,769

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

ACHILLE BIANCHI and MARLO PACKING
CORPORATION,

Defendants-Appellants,

VS.

ARTHUR E. H. BARILI,

Plaintiff-Appellee.

ARTHUR E. H. BARILI,

Plaintiff-Appellant,

VS.

ACHILLE BIANCHI and MARLO PACKING
CORPORATION,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLANTS.

J. E. TRABUCCO,

Russ Building, San Francisco 4, California,

Attorney for Defendants-Appellants.

FILE

JAN 1 1948



Subject Index

	Page
Statement of the case	1
Errors relied on and statement of issues	2
Argument	3
Explanation of the Barili patent in suit	3
Defendants' accused machine,.....	4
Claim 4 is invalid.....	5
Prior art antieipates claim 4	5
Argument re file history	11
Claim 4 invalid because disclosure does not support it....	15
Non-infringement	16
File wrapper estoppel	21
Conclusion	24
Plaintiff-appellant's appeal	25
Answering the opening brief of plaintiff-appellant.....	28

Table of Authorities Cited

Cases	Pages
Altoona Theaters v. American etc., 294 U. S. 484.....	14
Atherton v. Payne, 54 F. (2d) 821	15
Burt v. Evory, 133 U. S. 349	10
Butler v. Steckel, 137 U. S. 21	10
DeCew v. Union Bag & Paper Co., 57 F. Supp. 388	20
Duff v. Sterling Pump Co., 107 U. S. 630	17
Exhibit Supply Co. v. Ace Patents Corporation, 315 U. S. 126, 136	21
Fisher v. Karl, 6 F.R.D. 268	27
Flowers v. Austin, 149 F. (2d) 955	20
Garretson v. Clark, 111 U. S. 120	28
Heald v. Rice, 104 U. S. 737	10
Hoe v. Goss, 30 F. (2d) 271, 274	14
In re Adams, 117 F. (2d) 1017, 1018	15
In re MacFarren, 121 F. (2d) 468	15
In re Salomon, 136 F. (2d) 728	15
Keith v. Charles E. Hires Co., Inc., 116 F. (2d) 46, 48	23
McClain v. Ortmyer, 141 U. S. 419	20
Minerals Separation Ltd. v. Butte etc. Mining Co., 250 U. S. 336.....	16
Penn. Railroad v. Locomotive Truck, 110 U. S. 490	10
Peters v. Hanger, 134 F. 586.....	28
Pollen v. Ford Instrument Co., Inc., 108 F. (2d) 762, 763..	28
White v. Dunbar, 119 U. S. 51	19
Wilson Mfg. Co. v. Niedringhaus, 28 F. (2d) 766	16

Statutes

35 U.S.C.A. Sec. 70	27, 28
---------------------------	--------

Texts

48 Corpus Juris, p. 228	17
-------------------------------	----

No. 11,769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ACHILLE BIANCHI and MARLO PACKING
CORPORATION,

Defendants-Appellants,

VS.

ARTHUR E. H. BARILI,

Plaintiff-Appellee.

ARTHUR E. H. BARILI,

Plaintiff-Appellant,

VS.

ACHILLE BIANCHI and MARLO PACKING
CORPORATION,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLANTS.

STATEMENT OF THE CASE.

This is a patent infringement suit involving the infringement of claim 4 of the Barili patent No. 1,844,142. The court below found that claim 4 had been infringed. Defendant-appellant Bianchi is the manu-

(NOTE) : All italics supplied.

facturer of the accused ravioli making machine, and the other defendant-appellant, Marlo Packing Corporation is the user thereof. The questions involved are first, is claim 4 valid, and second, does the accused machine infringe this claim. An appeal is also taken by plaintiff-appellant with respect to the lower court's failure to award damages and attorney fees, and the ordering of the case to trial the day after an order had been entered setting aside a prior judgment in this case in favor of defendants-appellants.

ERRORS RELIED ON AND STATEMENT OF ISSUES.

The defendants-appellants challenge the correctness of findings 1, 2, and 3 (R. p. 24), and contend that the application of the controlling law does not warrant conclusions of law 3, 4, 5, 7 and 8 (R. pp. 25, 26). Findings 1, 2 and 3 state that defendants-appellants have made and used without authority, stuffed pastry machines of the type shown on defendants' exhibit B, and the conclusions of law state that claim 4 has been infringed.

The issues and defendants' contentions may be stated as follows:

1. Claim 4 of the patent in suit is invalid because it is anticipated by the prior art and for the further reason that the drawings and specification of the patent in suit do not support this claim.

2. Claim 4 in issue cannot be "fairly read" upon the accused machine, when considered in the light of

the file history, and in the light of the express terms and limitations of the claim, and also in the light of the prior art.

ARGUMENT.

EXPLANATION OF THE BARILI PATENT IN SUIT.

The Barili patent in suit (plaintiffs' exhibit 1) relates to a machine for making stuffed pastry, such as ravioli or filled confectionery. (Barili patent p. 1, lines 2, 3.) More particularly the patented machine comprises two rollers rotatable in opposite directions, one having indented molds and axial cutters between the molds and the other having annular cutters. The only claim in issue here reads as follows:

4. In a ravioli machine, a pair of intergearing rollers, one roller having indented molds and provided with axial cutters between said molds, the other roller being made with annular peripheral cutters adapted to be positioned between the molds of the first named roller at the point of contact of the rollers, all the molds being spaced apart so as to provide a wide margin between the cutters and the molds, means for feeding sheets of flour paste to the rollers, and a detachable open bottom hopper for guiding stuffing to the paste sheets on the rollers.

DEFENDANTS' ACCUSED MACHINE.

Defendants' machine (Defendants' Exhibit B) was the only structure before the Court. There was a rather vague attempt by plaintiff to show that defendant Bianchi manufactured another machine, but there is no adequate proof of its detailed construction nor of its date of manufacture. In fact, the uncontradicted testimony of defendant Bianchi is that he had not made any ravioli machine during the past six years (R. p. 99). There is no testimony or other evidence showing that the defendant, Marlo Packing Corporation, used either the machine shown on defendants' exhibit B or any other type of ravioli machine during the six year period preceding the filing of the complaint.

The lower court considered only defendants' exhibit B when passing on the question of infringement, and no doubt it will become apparent to this court that the only properly identified alleged infringing structure is the one shown on the large set of photographs, defendants' exhibit B.

Defendants' machine comprises two large rollers, one having a plurality of indented molds and the other carrying a number of spaced annular cutters and also a plurality of so-called axial cutters. The rollers are spaced one from the other and they are arranged to rotate in opposite directions. Two sheets of dough are conveyed between the rollers, and a stuffing material supplied from a hopper above is fed between the sheets. The stuffing material is pressed into the molds

between the sheets as the rollers rotate, thereby forming pieces of stuffed pastry, such as ravioli.

It is to be noted that unlike the structure defined by claim 4 defendants' accused machine includes one roller having molds but *no* cutters, while the other roller carries both sets of annular and axial cutters.

CLAIM 4 IS INVALID.

Under this heading it will be pointed out that claim 4 in suit is fully anticipated by the prior art and is utterly invalid.

This claim is also invalid because of its failure to read on the disclosures in the patent specification and drawings, or in other words, because the patent specification and drawings do not support the claim.

PRIOR ART ANTICIPATES CLAIM 4.

The Holmes patent No. 518,454, dated April 17, 1894 (Defendants' Exhibit D), discloses a machine for forming stuffed articles of pastry or confectionery. It includes:

1. Two pairs of rollers d,d which act to feed the paste or dough forward and also to form it into two sheets of desired thickness (p. 2, lines 1-5 Holmes patent);

2. Rollers e,c for forming and uniting the sheets. These rollers are formed with annular grooves which

are semi-circular in cross section. The Holmes patent describes the operation of these forming and uniting rollers (p. 2, lines 63-70) as follows: "The two sets of shaped semi-forms of paste are carried toward each other upon the rollers e, and at the point where the two rollers e come in contact with each other the edges of the semi-tubes are brought into adhesive contact with the edges of the opposite semi-forms and these edges unite and thus complete tubes are formed." Holmes shows in Figure 11 an arrangement on a roller e for cutting the product into suitable lengths. This structure is described on page 3, lines 107-114 as follows: "When the articles to be produced are of short lengths I sometimes cut or separate them into lengths by projections within the grooves of the rollers e. Such construction is shown in Figure 11 and the projections are there lettered X.";

3. A hopper or filling device i is positioned to feed a stuffing material between the paste sheets as they pass over the rollers e,e. The hopper i is adjustable and is supported on the machine's frame.

It is to be noted that Holmes (p. 3, lines 99-107) contemplates the use of the rollers e,e independently of the auxiliary rollers h, it being stated that "the sheets of dough will then pass directly over these forming and uniting rollers and down between them, and the shaping and uniting of the parts will take place simultaneously as the paste is fed between the rollers."

Evans No. 1,094,320, dated April 21, 1914 (Defendants' Exhibit E) shows two oppositely rotatable rollers,

one having *annular cutters* d, and the other "*axial*" *cutters* c. As the rollers are rotated and the dough is fed downwardly therebetween, the cutters d and c operate to cut the dough into squares.

Oleri No. 1,479,925, dated Jan. 8, 1924 (Defendants' exhibit F), was not one of the references cited by the patent office examiner during the prosecution of the Barili patent application. This patent is of considerable importance since it shows a roller having "*axial*" cutters and annular cutters with *wide margins* between the cutters and the molds for *sealing* the edges of the ravioli.

The *Tomassini* patent No. 1,236,998, dated Aug. 14, 1917 (Defendants' Exhibit G), and the *Raviolara pamphlet* obtained by defendant Bianchi in Europe in 1919 (Defendants' Exhibit A) were introduced into the record at the trial of the case to show that automatic ravioli manufacturing machines were in use long prior to the filing of the patent application which resulted in the patent in suit.

The Holmes and Evans patents disclose all of the elements of claim 4. In Holmes is found the forming and uniting rollers e,e, which correspond to and function in the manner of the rollers 11 and 12 of the patent in suit. The rollers e,e of Holmes have semi-circular grooves which permit the stuffing material to be fed between the sheets of dough as the latter are united to form sealed envelopes. Holmes shows wide annular ridges between the circular grooves which press the paste sheets together and unite them

so as to retain the stuffing material within the paste envelopes. The sealing of the paste sheets is described by Holmes (p. 1, lines 32-42) as follows:

“When my entire invention is used, filling devices are arranged and operated to feed suitable filling substance to and between the portions or sheets as they are brought together; and the pressure devices then cause the portions to unite; or when the articles are to consist of an envelope of hollow form and a filling substance, *the pressure devices cause the edges of the portions to unite*”;

and on page 2 lines 65-70 Holmes further states:

“at the point where the two rollers e,e come in contact with each other the edges of the semi-tubes or forms are brought into adhesive contact with the edges of the opposite semi-forms, and these edges unite and thus complete tubes are formed.”

The very purpose of the Holmes rollers e,e is to form the paste sheets and *unite* them in a manner whereby the stuffing material is held therebetween. Claim 4 of the patent in suit states that the molds are spaced apart to provide wide marginal flanges, but in Holmes there is also found *wide marginal flanges* between the annular molds or grooves of rollers e,e which also unite and seal the paste sheets.

Evans shows annular cutters d and “axial” cutters e which correspond to the annular and axial cutters of the patent in suit.

In ravioli making it has been the common practice for many years before the filing of the Barili patent application in 1927, to unite two paste sheets with stuffing material between by means of a roller having peripheral molds and cutters with wide margins between the cutters and the molds. Oleri, No. 1,479,925 clearly shows such a device. Both Holmes and Oleri anticipate the feature of claim 4, which includes wide marginal flanges between the cutters and the molds.

Claim 4 is fully anticipated by Holmes, Evans and Oleri. "A pair of intergearing rollers" are shown at e,e, in Holmes; the "axial and annular cutters" are shown in Evans at c and d; Oleri shows "wide margins" between the cutters and the molds for uniting the paste sheets and sealing the edges of the ravioli; Holmes also shows "wide margins" between the molds for uniting the sheets of paste; Holmes shows "means for feeding sheets of paste to the rollers" and "a detachable open bottom hopper i for guiding stuffing to the paste sheets on the rollers."

The fact that plaintiff's machine is designed to manufacture a type of stuffed pastry which is different in size and shape from that made by the Holmes machine, does not lend patentability to the Barili invention. A change in form, proportion or degree, doing substantially the same thing in substantially the same way by substantially the same means—is not patentable novelty.

It is apparent that the following quotations from certain United States Supreme Court decisions are applicable here.

Penn-Railroad v. Locomotive Truck, 110 U. S. 490, 28 L. Ed. 222:

“It is settled by many decisions of this court which it is unnecessary to quote from or to refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form or result has not before been contemplated.”

Butler v. Steckel, 137 U. S. 21, 34 L. Ed. 582:
 “In view of the testimony as to the state of the art it required no invention to make a single die to cut dough on a flat surface, into any particular shape desired whether the shape of a pretzel or any other shape. The question was one, not of invention, but simply of mechanical skill.”

Burt v. Ivory, 133 U. S. 349:

“A mere carrying forward of the original thought, a change in form, proportion or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.”

Heald v. Rice, 104 U.S. 737, 26 L. Ed. 910:

“The courts are guardians of the public interest and it is their duty to scrutinize with care every

attempt to establish a monopoly which a patent gives. The law does not allow mere mechanical skill to usurp the place of invention which involves higher thought, and brings different faculties into activity. It will not allow one to take from the public that which the public already has, or grant the exclusive privilege which the patent confers without consideration.”

ARGUMENT RE FILE HISTORY.

The fourteen original claims in the Barili patent application were rejected on the Holmes patent No. 518,454. (Defendants' Exhibit C, pages 10-13.) These claims were extensively amended (Defendants' Exhibit C, pages 18-20), but a second rejection resulted. Then followed the submitting of an entirely new set of claims, numbered 15 to 26. (R. 158-161.) Holmes and the Evans patent No. 1,094,320 were cited against certain of the claims (R. 163), and their rejection followed. Barili then extensively amended the claims (R. 165-172), but they were again rejected (Defendants' Exhibit C, pages 34, 35) on these same references, it still being contended by the examiner that it did not amount to invention to make the Holmes device, in the manner taught by Evans, with one roller carrying annular cutters and the other roller carrying axial cutters. The examiner's rejection (Defendants' Exhibit C, page 34) in part is as follows:

“It is again indicated that (see Fig. 4 of Evans) the elements d are the annular cutters on one roller, while the elements c are the axial cut-

ters on the other roller which fit between the annular cutters of the former. These rollers 4 and 7 could readily be substituted for the rollers e, e of Holmes' machine."

In the same official letter the examiner dismissed applicant's contention that the hopper embodied invention by stating:

"It is the opinion of the examiner that an artist at the trade could readily adapt the hopper of Holmes to be used for dispensing ravioli in that if it was seen that the filling material was not feeding properly a large aperture could be made in the bottom."

So up to this point during the prosecution of the Barili application we see the examiner has ruled that it was not patentably novel to provide two rollers with annular and axial cutters, and that it did not amount to invention to provide a hopper having an edge conforming to the contour of the rollers. It is also to be noted that the examiner *did not reverse his decision with respect to these two points at any subsequent time.*

The next development in the prosecution of the application was applicant's cancellation of the claims (with the exception of claim 26, now claim 1 which defined a roller made in sections, and which was probably new in the art), and the *substitution of claims which were limited to a combination in which there were broad peripheral margins between the cutters and the molds.* While the Holmes patent clearly shows peripheral means for uniting the two dough sheets

and sealing their edges, the examiner probably thought there was not a full disclosure of the "*wide margin between the cutters and the molds.*" The fact of the matter is, however, Holmes *does* show means carried by his rollers for uniting, cutting and sealing the edges of two sheets of dough so the stuffing therebetween cannot escape. It therefore would not be inventive to make the peripheral margins a bit wider, for such a change is a matter of degree and is not patentable.

But at this point it is to be noted that the examiner entirely overlooked the Oleri Patent No. 1,479,925 issued Jan. 8, 1924. (Defendants' Exhibit F.) The device shown in this patent is used for manufacturing ravioli. It shows, *molds and the arrangement of axial and annular cutters between the molds.* There is also shown *wide margins between the cutters and the molds which press the two paste sheets together, and unite them while the cutters cut the material into squares.* Here we see a device which simultaneously forms, seals and cuts the ravioli material. Had the examiner this Oleri patent before him, he undoubtedly would have rejected all of the claims (Except claim 1), for in Holmes we see at e,e the two forming, uniting and cutting rollers, at i the hopper for delivering a stuffing material to the dough sheets while they are passing over e,e; in Evans we see the two rollers with the axial and annular cutters; and in Oleri we see a roller with peripheral molds, annular and axial cutters, and wide margins between the cutters and the molds for uniting and sealing the paste sheets.

It is therefore obvious that claim 4 is directly met by the prior art and is invalid.

Presumption of validity of a patent grant is eliminated where the patent examiner fails to find a prior disclosure, discovery of which would have rendered the issuance of the patent doubtful. Judge Learned Hand in *Hoe v. Goss*, 30 F. (2d) 271, 284 stated:

“Moreover we are not faced with the presumption of validity in this respect because of the examiner’s failure to find Galley as a reference; it is at least open to doubt whether, had Galley been discovered, the claims would have been issued.”

The slight modification made in the Holmes, Evans and Oleri disclosures by Barili did not amount to invention. The test as to what constitutes patentable invention is stated in *Altoona Public Theaters v. American Tri-Ergon Corp.*, 294 U.S. 484 at 486 as follows:

“The patentees brought together old elements, in a mechanism involving no new principle, to produce an old result, greater uniformity of motion. However skillful this was done, and even though there was produced a machine of greater precision and a higher degree of motion consistency and hence one more useful in the art, it still was the product of skill and not invention.”

**CLAIM 4 INVALID BECAUSE DISCLOSURE DOES NOT
SUPPORT IT.**

Claim 4 is also invalid for still another reason. The terms of this claim specify that the cutters are adapted to be positioned between the molds “*at the point of contact of the rollers.*” It will be noted that both the patent drawings and the specification clearly show and describe the rollers as being spaced apart. In fact they must be in spaced relation since the cutters project therefrom, otherwise, the rollers could not rotate.

A claim which improperly describes the relationship of the elements of a claimed combination is invalid. Claim 4 is fatally defective since it is not supported by the disclosure.

In re Adams, 117 F. (2d) 1017, 1018, a Court of Customs and Patent Appeals case, gives the rule here applicable as follows:

“It is elementary that appellant’s disclosure must support the claims, and that where positive limitations are set out in the claims he may not rely on other patents or knowledge of those skilled in the art to supply those omissions in his own disclosure * * * To now read into his application, by implication a description of the limitations set out in the claims would be in violation of well established rules of patent law. It is too clear for argument that appellant’s disclosure does not support the claims before us.”

To the same effect:

Atherton v. Payne, 54 F. (2d) 821;

In re Salomon, 136 F. (2d) 728;

In re MacFarren, 121 F. (2d) 468.

NON-INFRINGEMENT.

As a preliminary, the Court will appreciate the fact that the protection furnished by a patent is measured by what is set forth in the claims, and that the patentee is bound by the limitations set forth therein. (*Minerals Separation Ltd. v. Butte etc. Mining Co.*, 250 U.S. 336.) Claims are narrowly construed when, as here the patent in suit is a mere improvement patent. (*Wilson Mfg. Co. v. Niedringhaus*, 28 F. (2d) 766.)

It will be noted that the Barili invention is not a pioneer in the art of manufacturing stuffed pastry. The Holmes patent No. 518,454, previously discussed herein, discloses an automatic machine for producing stuffed pastry. The Tomassini patent No. 1,236,998, issued in 1917 and the Raviolara pamphlet (Defendants' Exhibit A) published prior to 1919, show automatic ravioli machines. In fact it was frankly admitted by Barili when his application for patent was pending in the Patent Office that he was not the first to devise a ravioli machine. The file history at page 37 (R. p. 174) discloses that Barili made the following frank admission:

"Applicant is not the first to devise a ravioli machine. Reference is invited to Tomassini, 1,236,998, August 14, 1917. This machine is used in various parts of the country. . . ."

Plaintiff cannot resort to the doctrine of equivalents to give Claim 4 a broad interpretation for two reasons: (1) because of the state of the prior art, and (2)

because of the limitations inserted during the prosecution of the application in the Patent Office.

A definition of a pioneer invention is stated in 48 Corpus Juris at page 228 as follows:

“A pioneer invention is commonly understood to denote a patent covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the process of the art, as distinguished from a mere improvement or perfection of what has gone before.”

Most conspicuous examples of such pioneer patents are those granted to Howe for the sewing machine, to Morse for the electric telegraph, and to Bell for the telephone.

What is *not* a pioneer invention is stated in 48 Corpus Juris page 228 as follows:

“An invention which does not perform a function that was never performed by an earlier invention but merely performs its function in a substantially different way is not a ‘pioneer invention’ and the patent therefor is a secondary patent.”

It is to be noted therefore, that the patent in suit is not a pioneer, but merely a secondary or improvement patent, and one which is susceptible of but a narrow construction. The rule here applicable with respect to the interpretation and construction of claim 4 is stated in *Duff v. Sterling Pump Co.*, 107 U.S. 636, 27 L.Ed. 517 as follows:

“The case is one where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee. In the field of washboards made of metal, with the surfaces broken into protuberances formed on the body of the metal, so as to make a rasping surface and to strengthen the metal by its form and to provide channels for the water to run off. *Todd was not a pioneer. He merely devised a new form to accomplish these results. The defendant adopts another form. Under such circumstances the Todd patent cannot be extended so as to embrace the defendant’s form.*”

The Court below erred in not treating the patent in suit as a secondary or improvement patent, one which is susceptible of but a narrow construction. *The lower court disregarded certain limitations appearing in claim 4, and erroneously held that defendants’ accused machine came within the terms thereof.*

The structure set forth in claim 4 is as follows:

“In a ravioli machine, a pair of intergeared rollers, *one roller having molds and provided with axial cutters* between said molds, the *other roller being made with annular peripheral cutters* adapted to be positioned between the molds of the first named roller *at the point of contact of the rollers*, all the molds being spaced apart so as to provide a wide margin between the cutters and the molds, means for feeding sheets of flour paste to the rollers, and a detachable open bottom hopper for guiding stuffing to the paste sheets on the rollers.”

It is to be noted that the claim is limited to a structure wherein there are two rollers, *one having molds and axial cutters, and the other having annular peripheral cutters.*

In defendants' accused machine (Defendants' Exhibit B) *one roller has no cutters whatsoever, only molds; while the other roller has both annular and axial cutters, and no molds.*

Claim 4 is further limited to a structure wherein the rollers are *in contact with one another.* In defendants' machine the rollers are separated appreciably from one another.

Since defendants' machine does not embody the structure set forth in claim 4 there is no infringement thereof. The following decisions set forth the rules applicable here with respect to claim interpretation.

In *White v. Dunbar*, 119 U.S. 21, the rule concerning claim interpretation is stated as follows:

“Some persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction by merely referring to the specification, so as to make it include something more than, or sometimes different from, what its words express. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public as well as an invasion of the law to construe it in a manner different from the plain import of its terms.”

In *Flowers v. Austin-Western Co.*, 149 F. (2d) 955 the rule here applicable is stated as follows:

“ . . . thus it is clear that each of the patents is one of improvement on a combination of elements in prior use. In such a field the claims are not entitled to a broad and liberal construction, but on the contrary, the range of equivalents includes nothing not substantially identical with the means described in the patents, and the use of other known means, although equivalent in function, will be excluded.”

In *McClain v. Ortmyer*, 141 U.S. 419, 35 L. Ed. 800, the Court states as follows:

“The object of the patent law in requiring the patentee to particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery, is not only to secure to him all to which he is entitled, but to appraise the public as to what is still open to them. The claim is the measure of his relief, and while the specification may be referred to limit the claim, it can never be availed to expand it.”

In *DeCew v. Union Bag and Paper Corp.*, 57 F. Supp. 388, 395, the rule is clearly stated as follows:

“The claims, as the measure of the invention, not only define the limits of the patent monopoly but also determine the scope of the art, and these boundaries established by the patentee, may be neither expanded on or shortened to meet the exigency of the particular situation.”

FILE WRAPPER ESTOPPEL.

There is still another reason why claim 4 must be held to be not infringed, an examination of the file history (Defendants' Exhibit C) discloses at page 40 (R. 177) that claim 29 was submitted after several previous rejections of other claims. This claim specified that one of the rollers had molds with axial cutters between, and that the other roller had annular peripheral cutters positioned between the molds. The examiner rejected the claim on the ground that it was vague. (R. 178.) Applicant Barili then cancelled claim 29 and substituted claim 31 (R. 179), following which the examiner again rejected the substituted claim and required that the limitation "*at the point of contact of the rollers*" be inserted before it could be allowed (R. 180). The applicant then amended the claim by inserting the required limitation (R. 181), and claim 4 resulted.

Now, under well recognized principles in patent law, an applicant by inserting limitations in a claim in order to secure its allowance cannot later in a suit for infringement ignore these limitations and contend that an accused structure not having those limitations infringes. The recent United States Supreme Court case, *Exhibit Supply Co. v. Ace Patents Corporation*, 315 U.S. 126, 136, 86 L.Ed. 736, 744, is directly in point here. The facts are similar to those of the instant case, and the legal principle involved is applicable here. The applicant in the *Ace Patents Case*, by amendment during the prosecution of the application limited claim 7 in order to secure its allowance by inserting

certain limitations as to the location of certain elements of the combination sought to be patented.

The Supreme Court in its decision stated as follows at page 136:

“Had claim 7 been allowed in its original form it would have read upon all of the accused devices since all of the conductor means complementary to the coil spring are ‘carried by the table’. By striking that phrase from the claim and substituting for it ‘imbedded in the table’ the applicant restricted his claim to those combinations in which the conductor means, though carried on the table, is also imbedded in it. *By the amendment he recognized and emphasized the difference between the two phrases and proclaimed his abandonment of all that is embraced in that difference.* (Hubbel v. U.S. 179 U.S. 77.) The difference which he thus disclaimed must be regarded as material, and since the amendment operates as a disclaimer of that difference it must be strictly construed against him. (Smith v. Magic City Kennel Club 282 U.S. 790.) As the question is one of construction of the claim it is immaterial whether the examiner was right or wrong in rejecting the claim as filed (Hubbel v. U.S. Supra). It follows that what the patentee, by strict construction of the claim, has disclaimed—conductors which are carried by the table but not imbedded in it—cannot now be regained by recourse to the doctrine of equivalents which at most operates, by liberal construction to secure to the inventor the full benefits, not disclaimed, of the claims allowed. Plaintiffs exhibits do not infringe.”

By applying the principles set forth in the “Ace patents” case to the case at bar it will be readily seen

that Barili in amending claim 31 (now claim 4) through the insertion of the words "at the point of contact of the rollers" *abandoned any exclusive right to a combination employing rollers which were not in contact*. In other words, anyone has the right to use forming and cutting rollers which are *not in contact* with one another. In defendants' accused machine the rollers are not in contact. On the contrary, the rollers are appreciably separated in defendants' accused machine. Hence claim 4 is not infringed.

The doctrine controlling here is also stated by Judge L. Hand in *Keith v. Charles E. Hires Co. Inc.*, 116 F. (2d) 46, 48, as follows:

"But often even with the most sympathetic interpretation, the claim cannot be made to cover an infringement which in fact steals the very heart of the invention; no matter how auspiciously construed, the language forbids: It is then that the doctrine of equivalents intervenes to disregard the theory that the claim measures the monopoly and ignores the claim in order to protect the real invention. *The estoppel of the file wrapper puts an end to the court's power to do this: the applicant has abandoned his privilege to resort to an equivalent of the differentia*, which all infringements must therefore embody. He may still insist that the claim shall be generously interpreted, but his monopoly stops where the interpretation stops. So, therefore, as, but for the estoppel, Goldring (the patentee) might have been entitled to go beyond the claim there in the case at bar, he lost that privilege as to the element by which that claim differs from the cancelled claims. . . . 'Apertures in the lower portion' cannot be read as a single vertical aperture running from one portion into the portion above it; and

'aperture' cannot be aligned with itself. In such a case it is almost inevitable instinctively to resort to the doctrine of equivalents to escape such verbalism; but that is precisely what the estoppel forbids, as we have said. We hold therefore that the defendant did not infringe claim 3."

CONCLUSION.

It is respectfully submitted that claim 4 of the patent in suit is anticipated by the prior art and is invalid; that claim 4 is invalid for the further reason that the patent specification and drawings do not support it; that the patent in suit, being a secondary patent is susceptible of but a narrow interpretation which does not permit the application of the doctrine of equivalents in determining the question of infringement; that defendants' machine does not come within the terms of claim 4 and therefore does not infringe the patent in suit; and that the plaintiff is estopped to assert an interpretation of the claim in issue, which would give sufficient scope to cover the accused machine.

It is our contention therefore, that the judgment and decree of the lower court must be reversed with respect to the holding of infringement and validity of claim 4 of the patent in suit.

Dated, San Francisco, California,
January 9, 1948.

Respectfully submitted,

J. E. TRABUCCO,

Attorney for Defendants-Appellants.

PLAINTIFF-APPELLANT'S APPEAL.

Plaintiff-appellant contends the lower court erred in ordering the case to trial the day following the setting aside of a judgment against him. A review of the proceedings leading up to the setting of the case for trial should indicate that no error was committed.

The attorneys of record for plaintiff-appellant are and have been Alan Franklin of Los Angeles and Messrs. Boyken and Beckley of San Francisco.

On December 2, 1946, the case was originally set for trial, the trial date being Feb. 6, 1947. Notice was previously mailed on Nov. 25, 1946 by the Clerk of the U. S. District Court advising counsel that the case would appear on the law and motion calendar for setting. Only Mr. James Naylor an attorney for one of the defendants' was present on Dec. 2nd, when the case was set for trial. The affidavit of Mr. Beckley states that notice was not received by Mr. Franklin of either the notice fixing the day for the setting or the notice of the trial date; and the clerk's records seem to bear him out in this respect.

Following the setting of the case for trial and prior to the trial date, a motion by defendant-appellant with respect to the taking of depositions was heard by Judge Harris on December 10th, 1946. At this hearing Mr. Beckley was present and represented the plaintiff in opposing the motion. At that time there was some discussion between counsel as to the date of the trial (R. 47). It is thought that even if actual

notice had not been given plaintiff's counsel of the trial of the case, they were at least made aware of the fact that the case had been actually set for trial on Dec. 10th. Mr. Beckley no doubt thought that Mr. Franklin knew of the trial date, but being an attorney of record it was his responsibility to determine the date of the trial after having been informed that the case had been actually set for trial.

On Feb. 6, 1947, the day set for the trial of the case, plaintiff was not present in Court. Upon the examination of defendant Bianchi and the submitting of other evidence showing non-infringement, judgment was rendered in defendants' favor and costs and counsel fees were assessed against plaintiff in the sum of \$500.00.

On March 10, 1947 plaintiff's motion to set aside the judgment and to reset the case for trial was heard. (R. 44-51.) Defendants did not oppose the motion but insisted upon an early trial date. The court thereupon set the case for trial for the following day, March 11, 1947.

The case came on for trial as scheduled at 10 a.m. March 11, 1947. Counsel for plaintiff proceeded with the trial in the usual manner *without in any manner objecting* to the short notice or to his inability to secure witnesses or to his lack of time to prepare for the trial. As a matter of fact plaintiff's counsel had subpoenaed two witnesses here in San Francisco who testified in plaintiff's behalf, and Barili himself testified.

Plaintiff contends in his "statement of points," (R. 36) that he did not have sufficient time to secure evidence of his damages, but this is not correct since the case had been pending for almost five months before the trial on March 10, 1947. *No request was made during the trial for a postponement or for additional time to secure other evidence.* Apparently plaintiff was fully satisfied with his proofs.

It is the contention of these defendants-appellants that it would be impossible for plaintiff to prove damages in this case for the reason that neither defendants made or commercially used a machine of the character covered by plaintiff's patent within the six year period just prior to the filing of the complaint. (R. 99.) The statute of limitations would obviously bar any recovery of damages or profits from defendants under these circumstances.

As to Point 3 with respect to the failure of the Court to award attorney's fees, it is of course within the discretion of the court to award counsel fees to a prevailing party (*Fisher v. Karl*, 6 F.R.D. 268); but the empowering act (Patent Statute 35 U.S.C.A. § 70, as amended Aug. 1, 1946, Public Law 587 of the 79th Congress, Chapter 726) does not compel the Court to award attorney fees to the prevailing party.

**ANSWERING THE OPENING BRIEF OF
PLAINTIFF-APPELLANT.**

Certain statements made in plaintiff's opening brief are vague and misleading. Under the heading *Point 1*, there is a statement to the effect that plaintiff was not prepared to try the case on its merits or to prove at the trial his damages. There is nothing in the record supporting these statements. The trial of the case proceeded as scheduled and no request was made before, during or after the trial for additional time for submitting proof of damages.

As to *Point 2*, plaintiff is entirely wrong in his contention that the lower court was in error in not assessing damages against defendants. There is no proof whatsoever that plaintiff has suffered damages by reason of any alleged infringing acts of defendants. In fact the evidence is unmistakably clear that no machines of the kind disclosed by the patent in suit were made or used within the six year period preceding the filing of this action. (R. 99.) The lower court, in view of the testimony of Bianchi and the total absence of any evidence proving damages within the six year period prior to the filing of the complaint, could not have allowed damages. (35 U.S.C.A. § 70; *Pollen v. Ford Instrument Co., Inc.*, 108 F. (2d) 762, 763; *Peters v. Hanger*, 134 F. 586.) The case of *Garretson v. Clark*, 111 U.S. 120, is directly in point since the evidence is wholly insufficient to prove damages.

As to *Point 3* it should be noted that various references to the record made by plaintiff under this heading are somewhat inaccurate and misleading. For in-

stance reference is made to pages 97-99, 102, 66-67 and 88-92 of the record with the implication that defendant Marlo Packing Corporation used the "machine (Defendants' Exhibit B) for at least a year at great profit." The testimony of the witnesses recorded on these pages do not support the statement that the machine was used a year or that any profit whatsoever was made by Marlo. Since the evidence is wholly insufficient to prove damages, the lower court was entirely correct in not allowing damages.

Plaintiff-appellant's appeal is frivolous and should be dismissed with costs assessed against him.

Dated, San Francisco, California,

January 9, 1948.

Respectfully submitted,

J. E. TRABUCCO,

Attorney for Defendants-Appellants.

1871

1872

1873

1874

1875

1876

1877

1878

1879

1880

1881

1882

1883

1884

1885

1886

1887

1888

1889

1890

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

No. 11769.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ACHILLE BIANCHI and MARLO PACKING CORPORATION,
Defendants-Appellants,
vs.

ARTHUR E. H. BARILI,
Plaintiff-Appellee.

ARTHUR E. H. BARILI,
Plaintiff-Appellant,
vs.

ACHILLE BIANCHI and MARLO PACKING CORPORATION,
Defendants-Appellees.

**ANSWERING BRIEF FOR PLAINTIFF-
APPELLEE, ARTHUR E. H. BARILI.**

and

**REPLY BRIEF FOR PLAINTIFF-APPELLANT
ARTHUR E. H. BARILI.**

ALAN FRANKLIN,

356 South Spring Street, Los Angeles 13,

BOYKEN, MOHLER & BECKLEY,

W. BRUCE BECKLEY,

723 Crocker Building, San Francisco,

*Attorneys for Plaintiff-Appellee and Plaintiff-Appellant,
Arthur E. H. Barili.*



TOPICAL INDEX TO ANSWERING BRIEF FOR
PLAINTIFF-APPELLEE, ARTHUR E. H. BARILI

	PAGE
Preliminary statement	1
The invention in suit.....	2
Argument	5
The prior art.....	6
File wrapper amendments.....	31
Validity	37
Infringement	38
Alleged limitation of action.....	47
Conclusion	48

TABLE OF AUTHORITIES CITED

CASES	PAGE
Altoona Publix Theatres v. American Tri-Ergon Corp., 284 U. S. 484	30
Bell Telephone Case v. American Telephone Co., et al., 22 Fed. 309	7, 30
Cantrell v. Wallich, 117 U. S. 690, 6 S. Ct. 970, 29 L. Ed. 1017	7
Christian, In re, 308 O. G. 231.....	35
Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428.....	10
France Mfg. Co. v. Jefferson Electric Co., 106 F. (2d) 605; cert. den. 309 U. S. 657, 84 L. Ed. 1006.....	31
Goodman v. Paul E. Hawkinson Co., 120 F. (2d) 167.....	36
Hildreth v. Mastoras, 257 U. S. 27, 66 L. Ed. 112.....	5
Hoe v. Goss, 30 F. (2d) 271.....	29
Kennicott Co. v. Holt, 230 Fed. 157.....	35
Klein v. Russel, 19 Wallace 433.....	23
Krementz v. S. Cottle Co., 148 U. S. 558.....	19
Leads & Catlin v. Victor Talking Machine Co., 213 U. S. 318....	10
Loom Company v. Higgins, 105 U. S. 580.....	10
McClain v. Ortmyer, 141 U. S. 425.....	23
McMahon v. Tyng, 14 Allen (96 Mass.) 167.....	25
Schick Dry Shaver, Inc. v. Dictograph Products Co., 89 F. (2d) 643	36
Schick Dry Shaver, Inc. v. R. H. Macey & Co., Inc., 111 F. (2d) 1018	36
Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. 395	7, 30
Sherman Clay & Co. v. Searchlight Horn Co., 214 Fed. 86....	17, 19
The Portland Telegram v. New England Fiber Blanket Co., 38 F. (2d) 780.....	21, 22
Topliff v. Topliff, 145 U. S. 171.....	23, 30

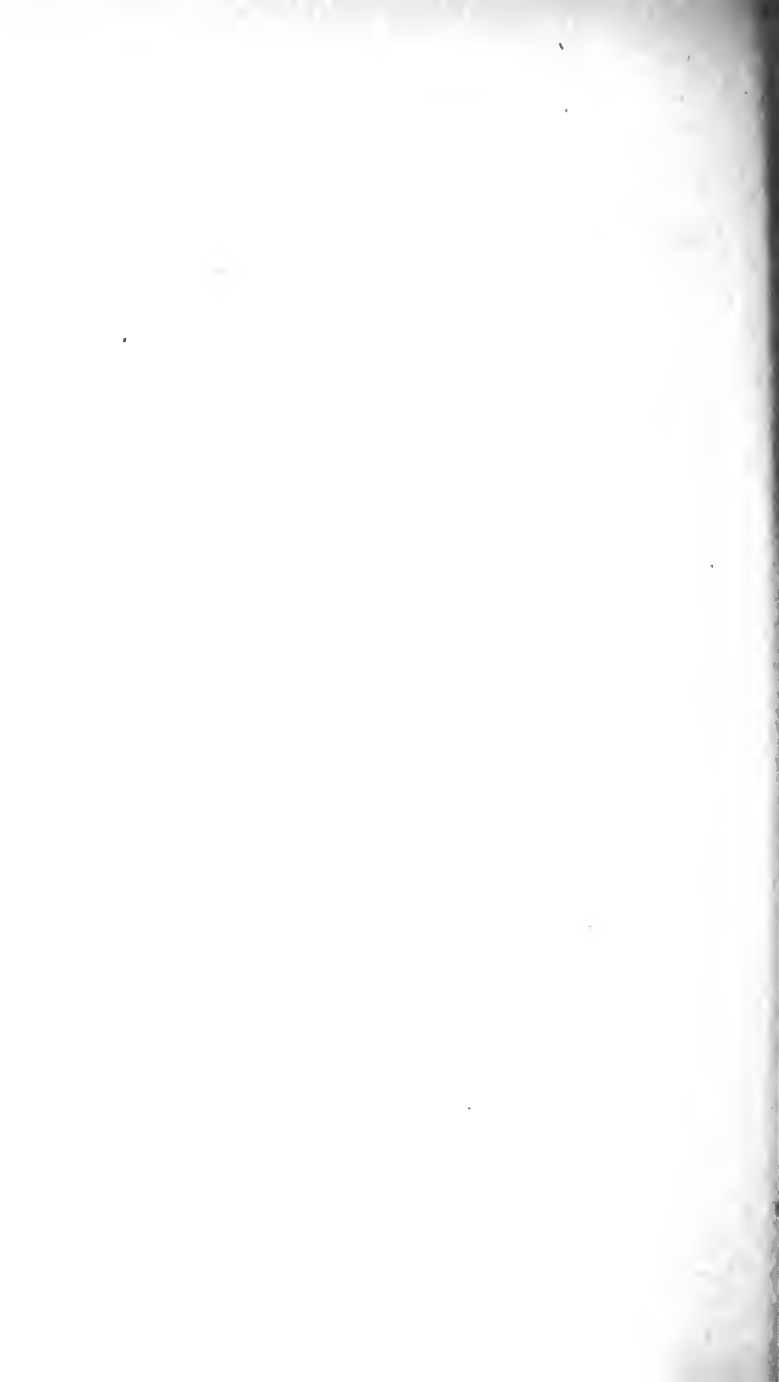
	PAGE
Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 42 L. Ed. 1136.....	5
Wheeler Salvage Co. v. Rinelli et al., 205 Fed. 717.....	35
Wilson & Willard Mfg. Co. v. Bole, 227 Fed. 607.....	7, 30
Wire Tire Machinery Co. et al. v. Paper Box Corp., Ltd., et al., 102 F. (2d) 543, 41 U. S. P. Q. 66.....	37
Yesbera v. Hardesty Mfg. Co., 166 Fed. 120.....	10
Miller v. Eagle, 151 U. S. 186, 38 L. Ed. 121, 14 S. Ct. 310.....	43

STATUTES

Revised Statutes 4921 (35 U. S. C., Sec. 70).....	47
---	----

TEXTBOOKS

Lewis, Astronomy Ancients i (1862), Sec. 1.2.....	34
The Oxford English Dictionary.....	34
Twentieth Century Dictionary.....	34
1 Walker on Patents (Deller's Ed.), Sec. 41, p. 216.....	20
1 Walker on Patents (Deller's Ed.), Sec. 63, pp. 300-302.....	7, 30
2 Walker on Patents (Deller's Ed.), Sec. 163, p. 757.....	35
2 Walker on Patents (Deller's Ed.), Sec. 241, p. 1206.....	23
2 Walker on Patents (Deller's Ed.), Sec. 247, p. 1211.....	5
2 Walker on Patents (Deller's Ed.), Sec. 247, p. 1212.....	20, 21
2 Walker on Patents (Deller's Ed.), Sec. 249, p. 1218.....	32
2 Walker on Patents (Deller's Ed.), Supp., Sec. 249, p. 110.....	31
3 Walker on Patents (Deller's Ed.), Sec. 450, p. 1680.....	46
3 Walker on Patents (Deller's Ed.), Sec. 463, pp. 1699-1700....	42
3 Walker on Patents (Deller's Ed.), Sec. 464, pp. 1700-1701....	43
3 Walker on Patents (Deller's Ed.), Sec. 466, p. 1703.....	42
3 Walker on Patents (Deller's Ed.), Sec. 470, p. 1708.....	43
3 Walker on Patents (Deller's Ed.), Sec. 701, p. 2009.....	7
Webster's New International Dictionary.....	34



No. 11769.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ACHILLE BIANCHI and MARLO PACKING CORPORATION,
Defendants-Appellants,

vs.

ARTHUR E. H. BARILI,

Plaintiff-Appellee.

ANSWERING BRIEF FOR PLAINTIFF- APPELLEE, ARTHUR E. H. BARILI.

Preliminary Statement.

This is a suit in equity for infringement of United States Letters Patent No. 1,844,142, issued to the plaintiff-appellee, Arthur E. H. Barili, February 9, 1932, for an invention in a Stuffed Pastry Machine [Tr. pp. 2-4]. The District Court below ordered, adjudged and decreed that said Letters Patent in suit, and particularly claim 4 thereof, are good and valid in law; that the defendant-appellant, Achille Bianchi, has infringed claim 4 of said Letters Patent, by manufacturing and selling stuffed pastry machines of the type exemplified in Defendants' Exhibit B; that the defendant-appellant, Marlo Packing Corporation, has infringed claim 4 of said Letters Patent, by using stuffed pastry machines of the type exemplified in Defendants' Exhibit B; that a final injunction may issue forthwith against said defendants-appellants; and that plaintiff-appellee may recover his costs of this suit [Tr. pp. 27-29].

The Invention in Suit.

The invention protected by the patent in suit, and particularly claim 4 of said patent, is a Stuffed Pastry Machine, and it is particularly useful for making *ravioli*, filled confectionery and other elementary products. Claim 4 appears on page 3 of the patent [Pltf. Ex. No. 1; Tr p. 50], and on page 179 of the Transcript of Record.

The invention includes generally a pair of intergearing forming and cutting rollers, indicated 11 and 12 in the patent; means, such as a table 3 and feed rollers 5 and 6, and a table 4 and feed rollers 7 and 8, for feeding two sheets of dough, indicated 9 and 10; and a hopper indicated 20, into which stuffing is deposited for delivery between said two sheets of dough, as said dough sheets are fed downwardly over and between said forming and cutting rollers 11 and 12, whereby ravioli or other stuffed products are formed and cut square-shape by said rollers 11 and 12, as shown in Figs. 2 and 3 of the drawing of the patent in suit [Pltf. Ex. 1].

The machine is driven by power, such as an electric motor (not shown), applied to a drive shaft 40, as shown in Fig. 1 of the patent drawing. The forming and cutting roller 12 is driven by the shaft 40 through sprockets and a chain 41, and the forming and cutting roller 11 is driven by roller 12 through intermeshing gears 42 and 43 on the shafts of said rollers 12 and 11, respectively. The feed roller 8 is driven by the roller 12 through sprockets on said rollers and a chain 39. The feed roller 7 is driven

by roller 11 through sprockets on said rollers and a chain extending over said sprockets. The feed roller 5 is driven by the roller 12 through sprockets on said rollers and a chain 44 extending over said sprockets. The feed roller 6 is driven by the roller 11 through sprockets on said rollers and a chain extending over said sprockets.

The forming and cutting rollers 11 and 12 are of novel construction. Referring to Fig. 4 of the patent drawing it will be seen that the roller 11 is formed with a plurality of annular rows of molds 11^a and 11^b , there being two of said rows of molds shown, but there may be any suitable number of rows of said molds. On the roller 11 are mounted rows of blade cutters, 15 and 16, extending longitudinally or axially of the roller, in the partitions between the molds 11^a , and in the partitions between and molds 11^b . On the roller 12 are mounted annular peripheral blade cutters 13 and 14, and these cutters are positioned to slit the dough or paste sheets 9 and 10 lengthwise as they pass between the forming and cutting rollers 11 and 12. It is important to note that, when the machine is in operation, the axially disposed blade cutters 15 and 16 on the roller 11 pass between the annular peripheral cutters 13 and 14 on the roller 12. The roller 11 (Figs. 4 and 5 of the drawings of the patent in suit) is formed with two annular end sections 30 and 31, of substantial width at the outer sides of the rows of molds 11^a and 11^b , respectively, and said roller is formed with straight longitudinal sections 32, of substantial width, between the molds 11^a , and with straight

longitudinal sections 33, of substantial width, between the molds 11b, in which longitudinal sections 32 and 33 are secured the longitudinal blade cutters 15 and 16. During rotation of the rollers 11 and 12, when the machine is in operation, the annular end cutters 13 of roller 12 contact the peripheral surfaces of the annular end sections 30 and 31 of the roller 11, and the intermediate annular cutter 14 of roller 12 contacts the peripheral surface of the intermediate annular section 34 of roller 11, while the longitudinal cutters 15 and 16 of roller 11 contact the peripheral surface of the roller 12 for cutting the ravioli square shape, as shown in Figs. 4, 2, and 3 of the drawings of the patent in suit [Pltf. Ex. 1]. The substantial width of the annular sections 30, 31 and 34, and the longitudinal sections 32 and 33 of the roller 11 is to provide sufficiently *wide* flanges around the stuffing pockets of the ravioli, when the dough or paste sheets 9 and 10 are cut by the cutters 13, 14, 15 and 16, so that said flanges, when pressed firmly together between the rollers 11 and 12, will close the edges of the stuffing pockets tightly and *effectively seal* the stuffing in the ravioli, thereby preventing the rollers 11 and 12 from pulling the ravioli open, as the same are drawn between said rollers and cut by the cutters 13, 14, 15 and 16 on said rollers, as illustrated in Figs. 1, 2, 3 and 6 of the drawings of the patent in suit.

ARGUMENT.

The appellees' invention, as covered by the patent in suit, and particularly by claim 4 of said patent, is the *first practical automatic continuously-operatable, mass production machine in the art, for producing ravioli without waste*, and is accordingly a *primary or pioneer* invention, because *it first successfully performed the new function of producing ravioli automatically and continuously on a large scale, and without waste*, to meet the demand of large modern packing plants. Appellee is prepared to prove on an accounting that his machine, operated by *one* man, produces 1200 cases of ravioli per day, whereas the most efficient competing machine, operated by *two* men, could produce only 100 cases of ravioli per day.

“A primary or pioneer invention, covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, is entitled to a broad range of equivalents.”

Walker on Patents (Deller's Ed.), Vol. 2, sec. 247, p. 1211.

Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 561, 42 L. Ed. 1136;

Hildreth v. Mastoras, 257 U. S. 27, 34, 36, 66 L. Ed. 112 (1921).

“Even though an invention be not a pioneer, if it marks a decided step in the art, it will be entitled to the benefit of the rules of equivalents, though not so liberal a degree as if the invention were of a primary character.”

Walker on Patents (Deller's Ed.), Vol. 2, sec. 247, p. 1212.

Appellee's invention, covered by the patent in suit, in stepping up production of ravioli far beyond the capacity of any competing machine, certainly marked a decided step and advance in the art. The advent of the appellee's invention revolutionized the ravioli manufacturing industry.

The Prior Art.

Only two prior patents, to-wit: Holmes No. 518-454, issued April 17, 1894, and Evans No. 1,094,320, issued April 21, 1914, set up in appellants' answer as a defense of prior invention, were introduced in evidence at the trial, as Defendants' Exhibits D and E [Tr. p. 105]. These two patents were cited by the Patent Office during the prosecution of the application for the patent in suit, as appear on page 17 (Paper No. 2) and page 27 (Paper No. 6) of the File Wrapper and Contents of Barili patent in suit, Defendants' Exhibit C, but upon careful examination, and after due consideration of said prior patents, the Patent Office found that said patents did not anticipate the Barili invention, and allowed the claims of the Barili patent in suit. The arguments of the solicitor of the Barili patent against said Holmes and Evans patents, appearing on pages 20, 26, 31, 32, 33, 36, 38, 40, 42 and 44 of the File Wrapper and Contents of the Barili patent, clearly and convincingly pointed out to the Patent Office the novelty and patentability of the claims of the Barili patent in suit over said prior Holmes and Evans patents.

The granting of Letters Patent in suit is *prima facie* evidence of the validity thereof, and raises a strong presumption of validity of said Letters Patent, which can be

overthrown only by proof to the contrary beyond a reasonable doubt.

“Either Letters Patent, or such a copy thereof, is *prima facie* evidence of the validity of the Letters Patent.”

Walker on Patents, Deller's Ed., Vol. 3, sec. 701, p. 2009;

Cantrell v. Wallich, 117 U. S. 690, 6 Sup. Ct. 970, 29 L. Ed. 1017.

“The burden of proof of a want of novelty rests upon him who avers it, and every reasonable doubt should be resolved against him. Novelty can only be negated by proof which puts the fact *beyond a reasonable doubt*.”

Walker on Patents, Deller's Ed., Vol. 1, Sec. 63, pp. 300-302;

Wilson & Willard Mfg. Co. v. Bole, 227 Fed. Rep. 607 (C. C. A. 9th, Circuit);

Bell Telephone Case v. American Telephone Co., et al., 22 Fed. Rep. 309;

Searchlight Horn Co. v. Victor Talking Mach. Co., 261 Fed. Rep. 395 (C. C. A. 9th Circuit).

The machine covered by the Holmes patent No. 518,454 could not produce ravioli. Said patent covers a machine for producing articles of *tubular* form, or articles consisting of an *elongated tubular* envelope and a suitable filling, such as a *stuffed macaroni*. The machine forms hollow or filled *cylindrical* sticks of candy or pastry [See p. 1, lines 45-54, incl. of Holmes patent specification]. This Holmes machine cannot produce ravioli, because it has no square or other suitably shaped molds, to form

pockets in sheets of dough, to receive ravioli stuffing, nor does said machine have any means for *forming and cutting marginal flanges of substantial width* around stuffing pockets, or any *means for firmly compressing together such flanges*, formed by the two sheets of dough compressed and cut between forming and cutting rollers, *to close such pockets and seal the stuffing effectively in such pockets.*

The Holmes machine has two pairs of rollers, e-h and e-h, or *four rollers* altogether for forming hollow or solid *sticks of pastry or candy*. The patented machine of the appellee, Barili, has only *two* co-acting rollers, 11 and 12, for forming, cutting and sealing *square-shaped ravioli* and the like. The Holmes machine has no means for cutting its products into square shape nor any means for sealing stuffing in a square-shaped pastry product such as ravioli. There being no marginal flanges along the *thin meeting edges* of the two semi-tubes of dough formed by the Holmes machine, said *thin meeting edges* of the tubular product could not be stuck and sealed together strongly enough to prevent the same from bursting apart under pressure of the stuffing in the tubular dough shell, which stuffing is *forcibly* pressed into said shell by the plunger *j* in the reservoir *i* containing the stuffing [See Fig. 1 of drawing and p. 2, lines 89-102 of the specification of Holmes patent].

The statement in the brief for Defendant-Appellants, page 8, that in the Holmes patent there is also found *wide marginal flanges* between the annular molds or grooves of rollers, *c, e*, which also unite and seal the paste sheets, is a gross misstatement. One glance at the drawings of the Holmes patent will clearly show that the

annular ribs between the annular grooves of the rollers *c* are definitely *very thin*. Moreover, Figs. 5 and 7 and Fig. 14 of the Holmes patent shows that the tubular or cylindrical product is formed *entirely within the annular grooves* of the rollers 2, and that there are *no marginal flanges* formed on the meeting edges of the product between the annular ribs of the opposing rollers *e*, as in the patent in suit.

The Holmes patent is nothing more than a paper patent. There is no evidence that the machine covered by the Holmes patent was ever successful in operation, or that its product was ever produced and sold on the market.

The statement on page 6 of defendants-appellants' brief, that the Holmes rollers *c* may be used independently of the roller 2 is irrelevant, because such use of said rollers forms *solid sticks*, while *ravioli* formed by the patented machine in suit is *not solid*, but has a *pocket containing stuffing* [See p. 3, lines 99-102, Holmes patent].

The Holmes machine could not perform the operations or accomplish the *new and useful results* of the Barili patented machine in suit, such as *forming square pockets* between two sheets of dough, *filling said pockets* with stuffing, *cutting the dough sheets into squares within which squares the pockets and stuffing therein are located*, forming *marginal flanges of substantial width around said pockets*, and finally *compressing said flanges* of the opposed cut sheets of dough together and effectively *scaling the stuffing in the pockets by said compressed flanges*, whereby *ravioli* is produced. The machine of the Barili patent in suit comprises a *new combination of elements*, which perform the *new functions* and operations, and ac-

comply with the new and useful results, as above described, and is a patentable invention marking a substantial advance in the art.

Loom Company v. Higgins, 105 U. S. 580 (591).

“A *combination* is a union of elements which may be partly old and partly new, a wholly old or wholly new. But whether new or old, the *combination* is a means—an *invention*—distinct from them” (the elements).

Leads & Catlin v. Victor Talking Machine Co., 213 U. S. 318, quoted in *Diamond Rubber Co. v. Consol. Tire Co.*, 220 U. S. 428.

“the law looks not at the elements as factors of an invented combination as a subject for a patent, but only to the *combination* itself as a *unit* distinct from its parts.”

Yesbera v. Hardesty Mfg. Co., 166 Fed. 120, at p. 125 (C. C. A. 6).

The Evans patent No. 1,094,320 is for a machine for the manufacture of feeding cakes for animals. The substance to be *compressed*—*meal or a mixture*—is introduced in bulk between the adjacent surfaces of the drums *x* and *y*, and said substance is *compressed* into square *cakes* by said drums between the laterally arranged teeth or projections *c* on the drum *x*, and the circumferentially arranged ribs or projections *d* on the drum *y*. The projections *c* and *d* are not knives or cutters, like the cutters 13, 14, 15 and 16 of the Barili patent in suit, because said projections are beveled to a considerable degree to perform their function of *wedging* and compressing therebetween the loose meal or mixture into the form

of *cakes*, and *not to cut* said loose material. The Evans machine does not handle *two thin sheets* of paste or dough, and has no means for introducing a filling between any such sheets to produce ravioli. Moreover, there are *no wide marginal* surfaces on either of the drums *x* and *y*, or cutters coacting with such surfaces for forming and cutting wide marginal flanges from sheets of dough, and compressing such flanges together to seal stuffing in ravioli. The Evans patented machine accordingly cannot perform the functions or accomplish the new results of the Barili patent in suit, and consequently the Evans patent is no anticipation of the Barili patent.

It is most significant that *claim 4* of the patent in suit, which claim the District Court held to be infringed by the defendants, was not rejected by the Patent Office on either the Holmes or the Evans patent, or any other prior art, but *was allowed without a single citation of prior art* against it. Claim 4 was amended upon the suggestion of the Patent Office Examiner for the sole purpose of eliminating what the Examiner considered vagueness, the Examiner stating that the claim otherwise "would no doubt be allowable," and it was allowed when amended to avoid the Examiner's so-called objection of vagueness [Tr. pp. 179-182 and 185; see also Deft. Ex. C, File Wrapper and Contents of Patent in suit, No. 1,844,142, pp. 36, 38, 40, 42 and 43]. Said amendment to claim 4 will be further considered hereinafter.

Since neither the Holmes nor the Evans patent, nor any other prior art, was cited by the Patent Office Examiner against claim 4 of the patent in suit, the attempt of counsel for appellants to set up said prior patents against said claim, and even without the testimony of a

patent expert, to invalidate said claim, against the strong presumption of validity of the patent in suit and particularly claim 4 thereof, in view of the record, is without merit and unworthy of serious consideration by this Honorable Court.

The Tommasini patent, No. 1,236,998 [Def't. Ex. G for Identification, Tr. p. 115] was not set up in the Answer of defendants [Tr. p. 6], to invalidate the patent in suit, but was offered only as prior art. The machine disclosed in this patent could not produce the standard *square-shaped* ravioli, because it handles and operates only *one* sheet of dough (indicated 1) at a time, from which sheet the ravioli envelope blanks (Fig. 1) are punched out in *circular* form, and said blanks are bent and folded upon themselves with stuffing forced therein, in the form roughly of a *half-moon*' [Fig 3, Tr. p. 115]. The *principle* of this Tommasini machine is quite different from that of the Barili patent in suit. In the Tommasini machine the *single* sheet of paste or dough 1 is fed *intermittently* and the forming rollers or cylinders 43-43 (Figs. 8-12) are correspondingly *rotated and produce ravioli intermittently*. In the *Barili* patented machine in suit the *two* sheets of dough 9 and 10 are advanced *continuously* and the two forming and cutting rollers 11 and 12 are *rotated and produce ravioli continuously*.

On page 1, lines 63-69, of the specification of the Tommasini patent, it is stated: "Through the intermediary of the toothed wheel 12 the pawl 8 produces the advance of the sheet of paste 1 *step-by-step*." On page 2 of said patent, included between lines 49-103, it is stated: "The severing member 22 is . . . provided with a lower flange 40, having an *arched cutting periph-*

ery 41 which is preferably indented as shown diagrammatically in Figs. 7 and 9, so as to sever and form the indented periphery on the *circular* piece of paste (Fig. 1) and thereafter *turn it back* as shown in Figs. 8 and 9.” . . . “It is necessary that the cylinders 43, 43 should not commence to carry the ravioli with them before the latter has received the stuffing and *it is also necessary that the stuffing should be fed to the ravioli while it is stationary.*” . . . “The plain and toothed portions of the wheels 50, 51 are of such dimensions that when the *feed of the sheet of paste ceases, the cylinder 43* for effecting the folding and closing operations *also stop* . . . During this *interval* the cutting of the pieces of paste and the deposit of the stuffing thereon takes place.”

From the foregoing it will be apparent that in the Tommasini machine the single sheet of paste (dough) is advanced *intermittently step-by-step*; that a *separate and additional severing member 22* is required to *sever the circular blanks* for forming a *half-moon shaped* ravioli, which is *not the standard square-ravioli*, produced by the Barili patented machine in suit; that the *intermittent* operation of the Tommasini machine to permit the stuffing to be fed into each ravioli envelope *while the machine is stopped* slows down the operation of the machine materially and thereby greatly reduces the productive capacity of the machine, in contrast to the *continuous operation* of the Barili patented machine in suit.

The stuffing in the Tommasini machine is supplied to the ravioli dough envelope 24 (Figs. 1, 8 and 9) by a *movable hopper 18*, which is moved down and up each time the stuffing is discharged therefrom into a ravioli dough envelope 24. In the Barili machine the hopper is

stationary and said movement of the Tommasini hopper is eliminated, thus simplifying and contributing to the speed, efficiency, and capacity of the Barili machine.

In the Tommassini machine the rollers or cylinders 43 have to rotate *a complete revolution to produce a single ravioli* on each pair of indentations 44, forming a mold on said rollers, while in the Barili machine there are *six molds*, and there can be a greater number of *molds* around the roller 11, in *each annular row of molds*, whereby *six, or a greater number, of ravioli may be produced by the Barili machine upon each revolution of said roller 11, for each ravioli produced by the Tammasini machine.* Moreover, the rollers 11 and 12 of the Barili machine are rotated *continuously* and produce ravioli *continuously*, while the rollers or cylinders 43 of the Tommasini machine are rotated *intermittently and have to stop each time a ravioli is produced* by the descent of the punch member 22 and piston 21, respectively, to cut the sheet of dough 1 into a circular blank 24 (Fig. 1), and to force the stuffing from the hopper 18 into said blank resting upon the indentations 44 on the rollers or cylinders 43. The sheet of dough 1 in the Tommasini machine is *punched full of holes* to form the ravioli blanks 24, as the dough sheet passes from the rollers or cylinders 43 over the roller 14 at the right end of the machine (Fig. 4), and *said sheet with the holes punched therein is either waste dough, or if it is picked up and kneaded and formed into another sheet to be run through the machine again, this is a hand operation and makes the machine only semi-automatic and not a complete automatic and continuous operating machine in handling the dough and making ravioli. The Tommasini machine also is not automatic*

because it has no means for taking a batch of dough and forming it into the sheet 1 and calibrating the sheet from which the ravioli blank 24 is punched by the punch member 22. The dough is evidently formed into the sheet 1 by another independent machine or rolled out by a *hand operated roller* on a flat surface and then placed by *hand* onto the machine. The Barili machine takes two batches of dough 1 and 2 (Barili patent) and *automatically rolls and calibrates the same into the sheets 9 and 10 of proper thickness* between the rollers 5 and 6, and the rollers 7 and 8, respectively, and feeds said sheets between the forming and cutting rollers 11 and 12 for enclosing the stuffing between said sheets and cutting the sheets into square ravioli and *scaling* the ravioli with *wide marginal flanges*. The Tommasini machine is evidently the machine which Mr. Barili had in mind when he testified [Tr. pp. 52 and 53], as follows:

“it was an entirely different construction than the system I used. I invented my machine after that. The way my machine work, it reduces the sheet, roughly sized, reduces the sheet to proper thickness, and fits them, forms them, and cut them all automatically without any hand operation.

Q. Is your machine *entirely automatic* after placing the dough and the filling into the machine? A. Yes.

Q. Do you know whether that machine in Italy was ever used in the United States? Did you ever see one in this country? A. Yes.

* * * * *

Q. Was it automatic? A. Well, not entirely, because the sheet—instead of using two sheets, you use one, and that had to be of proper thickness, and

it made individual ravioli, and it worked in the system of a *punch press*, and not to lay the dough on. It was of the other—one layer only and fold over.

Q. Was that a different principle of operation?

A. Yes, entirely different.”

In the Barili machine there is *no waste* of dough because *all of the dough of the sheets 9 and 10 goes into the ravioli in one operation* and no surplus dough or scrap dough with holes cut in it goes out of the machine, as in the operation of the Tommasini machine.

There is no evidence that the Tommasini machine ever went into general use in this country, in view of its *lack of complete automatic operation*, its slowness of operation, in view of its *step-by-step, stop-and-go intermittent operation*, and its *necessarily small capacity and output*. The Tommasini machine is entirely inadequate to meet the demand of large packing plants. If it was ever used to any extent in this country and if any other ravioli machine has been so used, *such use has been supplanted by the use of the appellee's (Barili) machine*, as shown by its general use in the large packing plants, such as Riviera Packing Co., Inc., Superba Packing Co., Ltd., and Marlo Packing Corporation [Tr. pp. 53-85 and 88-105]. It is significant that the Tommasini patent is not cited in the Barili patent application [see File Wrapper, Deft. Ex. C].

If there is any doubt as to the novelty, patentability and validity of the Barili patent in suit, the *outstanding commercial success* of the Barili machine, as shown by

the evidence, should resolve such doubt in favor of the Barili patent.

“In fact it has been announced as a rule of law of the Ninth Circuit that it is proper to charge a jury that the fact that a device has gone into general use and has supplanted other devices used for a similar purpose is sufficient evidence of invention in the absence of evidence to show that the success was due to any other cause than that of the merits of the device.” (Walker on Patents, Deller’s Ed.), Sec. 44, pp. 239-240.)

Sherman Clay & Co. v. Searchlight Horn Co., 214 Fed. Rep. 86 (1914) (C. C. A., 9th Circuit).

The Tommasini machine has no mechanical *automatic* means for returning the *punched surplus sheet of dough* to an independent mechanism for working over said surplus sheet, after the ravioli blanks have been punched from the sheet and the surplus punched sheet is discharged from the machine over the roller 14 at the right end of the machine (Fig. 4).

It takes *two men* to operate the Tommasini machine—one man to place the sheet of dough on one end of the machine (which sheet is first rolled on another mechanism) and another man to gather up the sheet of dough from the other end of the machine, after the ravioli blanks are punched therefrom, and carry said punched sheet of dough to another mechanism which first rolls the dough into sheets before it is placed on the Tommasini machine. The appellee’s machine requires only *one man* to operate it, because no surplus dough comes off the appellee’s machine to require another man to gather it up for again rolling it and using it over in the machine.

Appellants' attorney, on page 16 of his brief, quotes from the File History, page 37 [Tr. p. 174] of the appellee's patent in an attempt to show that the Tommasini machine is a prior automatic ravioli producing machine, but the *quotation does not state that said machine is automatic*. The statement quoted was made by the appellee's patent solicitor in an amendment as follows: "Applicant is not the first *to make a ravioli machine*." Nevertheless, the appellee denies that the Tommasini machine is a practical *automatic* ravioli producing machine, and reiterates that his patented machine is the *first practical and successful automatic continuously-operated ravioli producing machine*. Appellants' attorney left out an important part of the paragraph containing his quotation, which part supports the appellee's analysis of the Tommasini machine, as follows:

"Please note that Tommasini, in addition to a force feed, uses a pounder (Fig. 15), having experienced the difficulty of feeding flour paste. But *applicant is gradually replacing Tommasini, because it requires so much time and labor to operate and clean his device, that ravioli may be made cheaper by hand rollers*" [Tr. p. 174].

If ravioli may be made cheaper by hand rollers than by the Tommasini machine, said machine is certainly not a practical and successful ravioli producing machine. The statement that the machine of the applicant (appellee) is gradually replacing the Tommasini machine, because of the shortcomings of the latter machine, is evidence of the commercial success of the appellee's machine, and the patentability of the appellee's invention and validity of the appellee's patent, in view of such success.

Commercial success resulting from the merits of a machine like the appellee's machine is a deciding factor in determining the patentability of an invention, according to the Circuit Court of Appeals for this Ninth Circuit and the United States Supreme Court.

Sherman Clay & Co. v. Searchlight Horn Co., 214 Fed. Rep. 86 (C. C. A., 9th Circuit, 1914);

Krementz v. S. Cottle Co., 148 U. S. 558.

Considering further the statement of the appellee's solicitor, on page 37 [Tr. p. 174] of the File Wrapper of the plaintiff's patent, concerning the Tommasini machine, it is rather significant that after being informed of said machine, the Examiner in the Patent Office was not impressed with said machine, as clearly shown by the fact that he never cited the Tommasini patent as an anticipation of the appellee's (Barili) invention. This fact only emphasizes the lack of similarity of the Tommasini machine to the appellee's machine, and the fact that appellants' attorney has unduly magnified the position of the Tommasini machine in the state of the art out of all proportion to its real status therein. *No claim of the appellee's patent was rejected or limited by the Tommasini patent*, and such action of the Patent Office applies particularly to claim 4 of appellee's patent in suit [Tr. pp. 179-182].

If the Tommasini machine were an automatic machine containing the elements of the invention of the appellee's patent, it is truly significant that the defendant Bianchi did not copy the Tommasini machine, but copied appellee's machine and infringed appellee's patent, as shown by the fact that Bianchi took the appellee's machine from the Superba Packing Company to his shop and had all of its

parts here and there on the floor with numbers painted on them in order to copy appellee's machine to build the first Bianchi infringing machine for the Superba Packing Company, which was in operation when the appellee called at the appellant Bianchi's shop and saw his said dismantled machine on the floor [Tr. pp. 103-104]. Bianchi certainly would not have rejected the Tommasini machine and copied appellee's machine if the appellee's machine had not had outstanding merits as an automatic ravioli machine.

“In each of the many arts many patents have been granted on a corresponding number of new combinations of old parts for performing precisely the same function. The earlier of those combinations may be useful; *but not useful enough because not rapid enough*. To deny the quality of invention to all the later, different and far superior combinations for doing the same things would be unreasonable and unjust and plainly contrary to section 4886 of the Revised Statutes.”

Walker on Patents (Deller's Ed.), Vol. 1, Sec. 41, p. 216.

Appellee's patent does not have to be a pioneer or primary patent to be entitled to the doctrine of equivalents, and particularly to include such equivalent machines as the Bianchi infringing machines, which imitate so closely the appellee's patented machine, as claimed in claim 4 of the appellee's patent in suit.

Walker on Patents (Deller's Ed.), Vol. 2, Sec. 247, p. 1212.

It certainly does not call for a liberal construction of the appellee's patent to read claim 4 on the Bianchi ma-

chine [Exhibit B] in which the rollers are identical to the appellee's rollers, *except for the mere transfer of the axial cutters from one roller to the other*, without changing the function or operation of the appellant Bianchi's machine in cutting the ravioli, according to Bianchi's own testimony [Tr. pp. 92, 93, 95-100].

The ruling of the Circuit Court of Appeals of this Ninth Circuit in The Portland Telegram v. New England Fiber Blanket Co., 38 F. (2d) 780 (C. C. A. 9) (1930) *is controlling of the case at bar, regardless of whether the appellee's patent is a primary or a secondary patent.* The ruling in said case is stated in Walker on Patents (Deller's Ed.), Vol. 2, Sec. 247, page 1212, as follows:

“Where an invention undoubtedly marks a substantial advance in the art, the patent is to be given a reasonable liberal construction so as to secure to inventors the reward to which they are entitled.”

The appellee's machine certainly marked a substantial advance in the art of manufacturing ravioli over the Tommasini machine, which was the only machine of which there was any evidence of use. While the Tommasini machine makes *one ravioli upon a revolution of the rollers*, appellee's machine makes *six ravioli*. But in the Tommasini machine the rollers stop during each revolution to permit the dough to be punched and the stuffing to be pressed into the punched out dough to make a ravioli. *The Tommasini rollers are at rest at least half the time the machine is in operation.* The rollers of appellee's machine rotate *continuously*, and for each *ten* revolutions per minute of the appellee's rollers, *sixty* raviolis in each annular row of *six* molds are made by appellee's machine,

while only *five* raviolis in *one* mold can be made with the Tommasini machine, when its rollers are intermittently rotated at the same speed.

In said case, *The Portland Telegram v. New England Fiber Blanket Co.*, *supra*, the change in the defendants' infringing device was greater than the slight change in the defendants' (appellants) rollers in the present case, yet the Circuit Court of Appeals held that the defendant's device infringed the plaintiff's patent. In said case the patent specified a *single* piece or sheet and the defendant used *more than one piece or sheet*, and thereby *added one or more elements* to the defendant's structure, while the defendants (appellants) in the present case merely *transposed or reversed* one of the cutters of the rollers, but *did not add another element* to the machine. The Court of Appeals in said case held as follows:

"Appellant's position is that under the patent appellee can claim a monopoly for such a make-ready only when it is in a *single* piece or sheet. *With this view we are unable to agree.* As already suggested, we think by *their reference in the patent to a single sheet or strip* the patentees intended only to differentiate their invention from the make-ready then familiar in the art consisting of two pieces or units differing both in character and in function. *Their patent, therefore, is not to be so restricted as to exclude from its coverage the use of a plurality of sheets* of the same character and performing identically the same function, as a *single sheet* of equal bulk. Their invention undoubtedly marked a substantial advance in the art, and their patent is to be given a reasonably liberal construction, so as to se-

cure to them the reward to which they are entitled. See *Eibel Co. v. Paper Co.*, 261 U. S. 45, 43 S. Ct. 322, 67 L. Ed. 523.”

It thus appears that the Court of Appeals in the above case rationalized the patent in suit by construing the claims thereof according to the *spirit and intent* of the language of the patent, rather than according to the *letter* of the language thereof, and held the patent valid and infringed by the defendant, despite the technical difference between the patented device and the infringing device.

“The Court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed. In case of doubt, where the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention. The object of the patent law is to secure to inventors, a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation.”

Walker on Patents (Deller's Ed.), Vol. 2, Sec. 241, p. 1206;

Klein v. Russel, 19 Wallace, 433 (1873);

McClain v. Orimayer, 141 U. S. 425 (1891);

Topliff v. Topliff, 145 U. S. 171 (1892).

The print, Defendants' Exhibit A for identification, of alleged prior automatic ravioli machines, and particularly the machine entitled “Raviolara”, which was offered only as prior art [Tr. p. 82], is *not* prior art. *There is no*

date of publication on said print, and Mr. Barili testified than an application for patent for the Raviolara machine shown in said print was filed in Italy, and was rejected in view of a prior Italian patent which Mr. Barili secured for his machine [Tr. pp. 80-82]. Mr. Barili further testified that he was in correspondence with Mr. Mario Eccher, the name on that circular and the man who issued said circular [Deft. Ex. A for identification] a few years before he got his patent; that he sent some photographs of his machine to said Mario Eccher for the purpose of selling his machines in Italy; that he came to an understanding with said Mario Eccher for payment by him to Mr. Barili for the use of his machine under his Italian patent, which was already issued in Italy; that negotiations concerning Mr. Barili's Italian patent were suspended during the depression of 1932 or 1933; that in the meantime he received a letter from a party in Milan, Italy, desiring to negotiate for the use of Mr. Barili's Italian patent, which letter stated that somebody asked for the drawing of Mr. Barili's invention and somebody applied for a patent on said invention in Italy, which was rejected; and that later a patent was secured on Mr. Barili's invention in France a couple of years after the issuance of Mr. Barili's patent in Italy [Tr. pp. 85-87]. The illustration "Raviolara" on Defendants' Exhibit A for identification was no doubt reproduced from the photographs of Mr. Barili's machine, which he sent to Mario Eccher in Milan, Italy, the man whose name appears on the circular and who issued the circular, Defendants' Exhibit A for identification. Mr. Barili's testimony cancels out Mr. Bianchi's uncorroborated testimony concerning Defendants' Exhibit A for identification [Tr. pp. 80-82 and 85-87] and said exhibit is of no

probative value whatever, concerning the validity or scope of the patent in suit.

It will be noted that Defendants' Exhibit A for identification looks rather fresh for a paper circular picked up in Italy after the first World War in 1919 [Tr. p. 114].

The testimony of the appellant Bianchi concerning the "Raviolara" pamphlet is not corroborated and amounts to nothing more than a self-serving declaration of a party to this suit. Bianchi's uncorroborated testimony as to the date of the "Raviolara" pamphlet, which date is contradicted by appellee Barili [Tr. pp. 80-82; Deft. Ex. A for identification] fails to prove that said pamphlet is prior art, and is consequently incompetent, irrelevant and immaterial. *Bianchi did not describe the construction or operation* of the "Raviolara" machine with sufficient certainty to prove that it contained the vital elements of the appellee's patented invention that makes it an *automatic* machine. Parole testimony of the contents of printed pamphlets is generally inadmissible.

McMahon v. Tyng, 14 Allen (96 Mass.) 167, 168-171 (1867).

The Oleri patent, No. 1,479,925, January 8, 1924, is a single hand-operated device in the form of a rolling pin, which is rolled by hand over two sheets of dough with stuffing therebetween for forming ravioli. The patent, page 1, lines 83-87, states that "the material comprising the ravioli is first laid flatly upon a table (evidently by hand) after which the shaper and cutter is rolled (obviously by its handles 2) over the same, thereby forming, sealing and cutting the individual raviolis in one operation."

The Oleri device has *no automatic means* for bringing two sheets of dough into juxtaposition to receive a stuffing therebetween; it has *no automatic means* of introducing a stuffing between moving juxtaposed sheets of dough; and it has *no automatic means* for forming and cutting ravioli from the ravioli material. The Oleri device has *no wide marginal surfaces* for forming *wide marginal flanges for sealing* the stuffing in the ravioli around the edges thereof. The circumferential projections or ribs 3 and the longitudinal wooden strips 4 of the Oleri patented device are very narrow, and do not provide wide marginal surfaces for forming wide marginal sealing flanges around the ravioli, as provided on the rollers 11 and 12 of the appellee's patent. The Oleri device is only a kitchen utensil—a gadget.

In rolling the dough out flat into two sheets by a rolling pin for making ravioli with the Oleri device, *it is not possible to roll the sheets of dough with the rolling pin to a uniform thickness throughout*, and as the Oleri device is constructed with metal strip cutters 5 of *uniform* depth for cutting the dough, said cutters upon engaging the surface of the table determine a *uniform* thickness to which the two sheets of dough may be compressed between the wooden annular projections 3 and strips 4, and the surface of the table for compressing the marginal flanges of the ravioli uniformly together to seal the edges of the ravioli. Consequently, when the Oleri *single-roller* device is rolled over the two sheets of dough of varying thickness on a table with stuffing between the sheets, the

thinner portions of said sheets forming narrow marginal flanges of the ravioli will not be pressed firmly together like the thicker portions of the sheets, but will be left spaced apart and unsealed with stuffing between them, which unsealed flanges will spread open and permit the stuffing to drop out of the ravioli, and particularly during boiling and cooking of the ravioli for eating.

The above objection to the Oleri device is overcome by the machine of the Barili patent in suit with the use of the calibrating rollers 5 and 6, and 7 and 8, and the two forming and cutting rollers 11 and 12. The rollers 5 and 6, and 7 and 8 calibrate the sheets of dough 9 and 10, respectively, to the correct and a *uniform* thickness, while the forming and cutting rollers 11 and 12 may be adjusted and set at their point of *working contact* so that the two dough sheets 9 and 10, passing between said rollers 11 and 12, will be compressed uniformly and firmly together between said latter rollers, at the marginal portions 30, 34 and 32 of the molds 11^a and 11^b of roller 11, to form and *tightly seal* the marginal flanges of the ravioli, as shown in Figs. 2, 3 and 4 of the patent drawings; and as said marginal ravioli flanges of the two sheets of dough are compressed together between the rollers 11 and 12, any stuffing between said flanges will be squeezed upwardly from between said flanges back up into the bottom of the stuffing hopper 20 (see page 2, lines 5-14, of Barili patent in suit). Consequently, in the operation of the Barili machine, the marginal flanges of the ravioli cannot be left spread apart and unsealed with stuffing between said

flanges, as it would frequently happen in the use of the Oleri single hand-roller device when portions of the dough sheets are rolled too thin by a rolling pin.

The Oleri device is not an automatic ravioli machine suitable for factory mass production, like appellee's patented automatic stuffed pastry machine. The Oleri device does not have the important novel and distinctive elements of appellee's automatic machine; it cannot function like appellee's machine; and it cannot accomplish the new and superior results of appellee's machine. The Oleri patent was not even cited by the Patent Office against the Barili patent application, as appears from the Barili file wrapper, and it has no bearing on the Barili invention.

The brief of defendants-appellants, on page 13, contains the absurd assertion that the Patent Office Examiner entirely overlooked the Oleri patent, which shows molds with *wide* margins between the cutters and the molds. One glance at the Oleri patent will show that margins between the cutters and the molds are clearly and decidedly *very narrow*—so narrow that the margin flanges of any ravioli produced by the Oleri roller would not be sufficiently wide to form an effective seal when compressed, to prevent the marginal edges of the ravioli from coming apart and allowing the stuffing to drop out, and especially if the Oleri roller were used in a fast automatic machine like Barili's patented machine in suit, in which the sheets of dough are subjected to considerable strain by the rollers 11 and 12. It is inconceivable that the Patent Office Examiner overlooked the Oleri patent, and the pre-

sumption is that it did not. The Examiner no doubt did not cite the Oleri patent because in his expert judgment it does not disclose the invention of the Barili patent in suit, as hereinbefore particularly described and as described in the specification and claim 4 of the patent in suit. It will be noted that claim 4 of the patent in suit specifies the *molds 11^a* and the *molds 11^b* being *spaced apart* so as to provide a *wide margin* between the cutters and the molds, *means for feeding sheets* of flour paste or dough to the rollers, and a *detachable open bottom hopper for guiding* stuffing to the paste or dough sheets on the rollers. These novel elements and their functions are neither disclosed nor suggested in the Oleri patent.

Concerning the fact that the Oleri patent was not cited against claim 4 of the patent in suit, it should be noted that no other patent or prior art was cited against that particular claim [Tr. pp. 179-182 and 185]. Claim 4, original claim 31, was inserted in the application for the patent in suit near the end of the prosecution of the application and at a time, over three years from the filing date of said application, when the Patent Examiner was thoroughly familiar with the invention in suit and the prior art, and it is highly improbable that the Examiner could have overlooked the Oleri patent or any other patent in the art.

The case of *Hoc v. Goss*, 30 F. (2d) 271, 284, cited on page 14 of Appellants' Brief, is not in point because the Oleri patent does not disclose the novel elements of claim 4 of the patent in suit, as above pointed out. If

there were any doubt whether the Patent Examiner overlooked the Oleri patent, the patent in suit is entitled to the benefit of the doubt.

Walker on Patents, Deller's Ed., Vol. 1, Sec. 63, pp. 300-302;

Wilson & Willard Mfg. Co. v. Bole, 227 Fed. Rep. 607 (9th Circuit);

Bell Telephone Case v. American Telephone Co., et al., 22 Fed. Rep. 209;

Searchlight Horn Co. v. Victor Talking Machine Co., 261 Fed. Rep. 395 (9th Circuit).

The case of *Altoona Public Theatres v. American Tri-Ergon Corp.*, 284 U. S. 484, 486, cited on page 14 of Appellants' Brief, is not in point, because the machine covered by the patent in suit embodies a *new principle* and accomplishes a *new and useful result*, to-wit: produces ravioli *automatically and continuously without waste*, with two sheets of dough of *uniform thickness*, and with *wide marginal sealing flanges compressed together with uniform pressure into adhesive and effective sealing contact*. The *invention* of the patent in suit could not be constructed from the Holmes, Evans, Tommasini, Oleri or other prior patents. The applicable rule is stated in *Topliff v. Topliff and another*, 145 U. S. 156, 36 L. Ed. 658, as follows:

“It is not sufficient, in order to constitute an anticipation of a patented invention, that the device relied upon, might, by modification, be made to accomplish the function performed by that invention, if it were not designed by its maker, nor adapted, nor actually used for the performance of such function.”

File Wrapper Amendments.

No significance should be attached to the fact that certain claims in the application for the patent in suit, as appears in the file wrapper, were rejected, as originally filed, and thereafter cancelled or amended or new claims inserted to avoid the prior art. This practice is typical of the prosecution of practically all patent applications in the Patent Office.

It is significant, however, that *claim 4, the only claim in issue in this appeal was not rejected on any prior art, and was amended at the suggestion of the Patent Office Examiner only to clarify the claim and to comply with the requirement of the Examiner [Tr. pp. 179-181], whereupon said claim [originally numbered 31, Tr. p. 179] was allowed by the Examiner as amended without narrowing its scope as originally filed [Tr. p. 182].* The prosecution of said claim was short and sweet, and unlimited by the prior art, or any action by the Patent Office or any other claim in the patent application.

“Where reference to history of patent in Patent Office discloses that in original application a claim was made and rejected, *but none of the claims involved in infringement suit was amended or narrowed by reason of such rejection, such claims should not be narrowed or restricted because of the action of the Patent Office.*”

Walker on Patents (Deller's Ed.), Supplement to Vol. II, Sec. 249, p. 110;

France Mfg. Co. v. Jefferson Electric Co., 106 F. (2d) 605 (C. C. A. 6, 1939), c. d. 309 U. S. 657, 84 L. Ed. 1006 (1940).

“It may be remarked that courts generally have been disposed to give much consideration to the fact that an applicant for practical reasons of expediency is often compelled to unduly narrow his claims while the application is pending, and in such cases *lean as far as possible in the direction of liberality* where the limitations imposed by the Patent Office appear to have been unwarranted. It may be noted that the Court of Appeals of the Second Circuit *gives effect to limitations imposed by the Patent Office only in so far as an estoppel has been created.* Westinghouse Elec. Mfg. Co. v. Condit Elec. Mfg. Co., 194 Fed. 427, C. C. A. 2),” and other cases cited.

Walker on Patents (Deller’s Ed.), Vol. II, Sec. 249, p. 1218.

It may be noted in passing that claim 1 of the patent in suit was amended only to make it accurate, and such amendment broadened the claim, while claims 2, 3 and 5 were allowed as presented and without amendment [Tr. pp. 161, 163-164, 173, 176, 177 and 178].

There is *no prior art* that shows a forming and cutting roller with *wide margins* between the cutters and the molds, as specified in claim 4 of the patent in suit, whereby *wider marginal sealing flanges* are formed on the ravioli for effectively sealing the ravioli. Such *wide margins* on the forming and cutting roller 11 is a *novel element* of the invention of the patent in suit, and said element in claim 4 of the patent provides a *new combination* of elements which constitutes a patentable invention.

On pages 15 and 21 of the Brief for Defendants-Appellants, an attempt is made to misconstrue the meaning of the words “at the point of contact of the rollers,” which

words were inserted in claim 4 of the patent in suit by amendment *at the suggestion of the Patent Office Examiner*, who is an expert in the art and certainly should know the correct terminology of the art. Said amendment was not required in order to avoid any prior art, but only to clarify claim 4, which the Examiner otherwise considered to be vague. Appellants' attorney assumes that there is no point of contact between the rollers 11 and 12 of the patent in suit, but as a matter of fact *there is definitely a point of contact between said rollers*, when it is considered that the cutters 13 and 14 are constituent parts of roller 12 and contact the peripheral surfaces 30 and 34 of the roller 11, while the cutters 15 and 16 are constituent parts of roller 11 and contact the peripheral surface of the roller 12 at a point between said rollers on a line drawn through the centers of said rollers, as illustrated in Figs. 1 and 4 of the drawings of the Barili patent in suit. If any part of an object contacts any part of another object, *the objects contact each other* and, consequently, with the constituent cutters of each roller of the patent in suit in contact with the peripheral surfaces of the other roller, the rollers 11 and 12 of said patent unquestionably *contact each other*.

Even if the word "contact" were applied only to the cylindrical surface of the rollers 11 and 12, which surfaces are spaced slightly apart to permit the sheets of dough to pass and be compressed therebetween, such slight spacing would be included within the dictionary meaning of the word "contact" and the sense in which the word is used in the patent in suit. According to the leading dictionaries the meaning of the word "contact" is not restricted to an actual touching of two objects. The meaning of the word "contact" is determined by the

sense in which the word is used. A few dictionary definitions of the word "contact" will illustrate the elasticity of meaning of the word:

The Oxford English Dictionary:

"Contact: To come in contact with: come across, be brought into *practical* connection with. * * *

1862 Lewis Astron. Ancients i.

§1.2. The *history of astronomy* has numerous *points of contact* with the general *history of mankind*."

20th Century Dictionary:

"Contact: To be in touch or juxtaposition with."

Note: *Juxtaposition* means a placing or being placed in *nearness* or contiguity, the state of being *side-by-side*.

Webster's New International Dictionary:

"Contact: Military—Proximity (to other troops of the same command or to the enemy) sufficiently close to permit of constant communication or observation. Medical—A person who has been exposed to a contagious disease."

The placing of the rollers 11 and 12 of the patent in suit with their cylindrical *surfaces* irrespective of *their cutters*, in slightly spaced relation, to permit the two sheets of dough to pass and be *compressed between said roller surfaces*, positions said rollers *side-by-side*, in *juxtaposition* and in *operative, working contact*, for producing ravioli, and said position of said rollers comes particularly within the definition of the word "contact" as defined above in the 20th Century Dictionary.

It is significant that the word "contact" is not listed or defined in the leading Knight's Mechanical Dictionary, which leaves a wide latitude of meaning of the word when used in mechanics, as it is used in the patent in suit, and particularly in claim 4 of the patent. The meaning of the word "contact" in claim 4 must necessarily be determined by the specification of the patent in suit, since the specification is the dictionary of the claims.

"Technical use of words is not necessary; an inventor has the right to use such words as seem to him to best describe his invention, and they will be so construed as to effectuate that result. A patentee is at liberty to select and supply his own dictionary."

Walker on Patents, Deller's Ed., Vol. 2, Sec. 163,
p. 757;

Wheeler Salvage Co. v. Rinelli et al., 205 Fed. Rep.
717, 727;

In re Christian, 308 O. G. 231;

Kennicott Co. v. Holt, 230 Fed. Rep. 157.

The meaning of the word "contact" as it appears in claim 4 of the patent in suit is given in the patent on page 2, lines 4-7, as follows:

"The two rollers 11 and 12 are adjustably fixed *so close together* that the two sheets of paste are very firmly pressed together."

In such close relationship the rollers 11 and 12 are in mechanical *juxtaposition* and in operative "contact" for making ravioli; and such relationship of the rollers comes

within the dictionary definitions of the word "contact" as it appears in claim 4 of the patent in suit. The term "at the point of contact of the rollers" properly describes the relationship of the rollers in the light of the ruling of this Honorable Court in *Goodman v. Paul E. Hawkinson Co.*, 120 F. (2d) 167, p. 171 (C. C. A. 9, 1941), as follows:

"(5) Claim 6 does not indicate any *compression* of the tire except by the phrase '*permitting expansion thereof against an annular matrix.*' The patent owner claims that this indefinite statement must be interpreted in the light of the patent *drawing and specifications*. This is in accord with our decision in *Shull Perforating Co., Inc., v. Paul Cavins*, 9 Cir., 44 F. (2d) 357, 364, where we said: 'The patentee is entitled to have the claims of the patent construed with reference to the *drawings and specifications*. Where the means referred to in claims are clearly shown in the description of the patent, this description is sufficient to cover the means thus disclosed and its mechanical equivalent.' Walker on Patents, 6th Ed., Vol. 1, p. 195, sec. 162a. * * * *Wessel v. United States Mattress Mach. Co.*, 6 Cir., 139 F. 11, 15."

Schick Dry Shaver, Inc., v. Dictograph Products Co., 89 F. (2d) 643 (C. C. A. 2, 1937);

Schick Dry Shaver, Inc., v. R. H. Macey & Co., Inc., 111 F. (2d) 1018 (C. C. A. 2, 1940).

The amendment of claim 4 by inserting the words "at the point of contact of the rollers" did not change the

substantial meaning of the claim as it stood before amendment, and, consequently, said amendment does not invalidate said claim.

“Changes in language not changing the substantial meaning as it stood before amendment and even changes of meaning narrowing the scope of the invention described, do not infringe the statute.”

Wire Tire Machinery Co. et al. v. Paper Box Corp., Ltd., et al., 102 F. (2d) 543 at p. 560, 41 U. S. P. Q. 66.

The ruling of the lower court concerning the word “contact” includes the following statement:

“Despite defendants’ contention that the word contact means ‘touch,’ the Court is not persuaded to accept such a definition, nor to find a distinction in the two machines based on a refined dictionary definition which has no place in the terminology of scientific text books.”

It is submitted that the above ruling of the lower court is sound and should not be disturbed by this Honorable Court.

Validity.

The lower court has held the Barili patent in suit valid, in its Conclusion of Law 3 and in its Final Judgment, paragraph 2 [Tr. pp. 25 and 27], and there is nothing in the prior art that would justify a reversal of this holding of the lower court.

Infringement.

Infringement of claim 4 of the Barili patent in suit by both defendants-appellants, Achille Bianchi and Marlo Packing Corporation, is charged by the plaintiff-appellee, Arthur E. H. Barili, and the lower Court has upheld said charge of infringement in its Findings of Fact 1 and 3 [Tr. p. 24], in its Conclusions of Law 4 and 5 [Tr. p. 25], and in its Final Judgment, paragraphs 3 and 4 [Tr. p. 28].

The elements of claim 4 of the patent in suit are contained in the ravioli machine manufactured and sold by the defendant-appellant, Bianchi, and used by the defendant-appellant, Marlo Packing Corporation, which elements are described in the Answer to Interrogatory 7 and shown in the print attached to the interrogatories of defendants Achille Bianchi and the Marlo Packing Corporation and answers thereto.

Said interrogatories and answers are marked Plaintiff's Exhibit 2 for Identification [Tr. pp. 8-13 and 51]. The answer to interrogatory 7, and the print attached to the answers to the interrogatories, describe and show the intergearing rollers 11 and 12 with indented molds 11^a and 11^b, and 12^a and 12^b, annular cutters 13 and 14, and axial cutters 15 and 16, wide peripheral margins 11^c and 12^c between the molds and the cutters 13-16, between which margins and the opposite roller the paste sheets become firmly compressed together, means for feeding sheets of paste to the rollers 11 and 12, which means are indicated as the rollers 5 and 6, and 7 and 8, tables 3 and 4, chain 39, sprockets 39^a and 39^b, chain 44 and sprockets 44^a and 44^b, and a detachable open-bottom hopper 20 for guiding the stuffing to the paste sheets on the rollers 11 and 12. While molds are shown in *both* rollers in the interrogatory

print, this arrangement is an obvious equivalent of the molds in only *one* roller, as included in claim 4 of the patent in suit, because the result produced by *two coating shallow molds* and the result produced by *one deeper mold* is the same in producing ravioli. Both forms of molds are included in the patent in suit, because Figs. 1, 4 and 5 show the single deep molds in one roller 11, while Fig. 6 shows the two coating shallow molds in both rollers 11 and 12; and the construction of the two coating molds in the two rollers is described in the specification, page 3, lines 26-27, of the patent in suit.

The interrogatories of defendants and answers thereto were marked Plaintiff's Exhibit 2 for Identification, in view of the groundless objection and self-serving and irregular *testimony of counsel* for defendants; and it was error of the trial court in not formally admitting said interrogatories and answers in evidence, because said interrogatory answers and print are in fact and in law in accordance with the constructions manufactured and sold by the defendant Bianchi and used by the defendant Marlo Packing Corporation. Defendants' attorney asked for the interrogatory print and he got what he asked for, and is bound by it, and in the absence of proof to the contrary, the structure of the rollers shown in said print is proof by a preponderance of evidence that the structure of the rollers of the Marlo machine, built and sold by the defendant Bianchi, Defendants' Exhibit B, is the mechanical equivalent of the structure of the rollers shown in said print. Consequently, the Marlo machine, which contains all of the other elements of claim 4, is an infringement of said claim.

Defendant-appellant, Bianchi, *did not deny* that he made his forming and cutting rollers exactly like the rollers 11

and 12 as specified in claim 4 of the Barili patent in suit, that is to say, with molds and axial cutters on one roller and annular cutters on the other roller. Bianchi testified as follows:

“A. Yes, I made some rollers with the pocket, the margin, and the cutters all in one roller, which we have patent. I made it for the lady Mr. Trabucco has.

Q. Did you ever make any with the *annular cutters on one roller*? A. Not that I remember, *which is not necessary*.

Q. *The axial cutters on the other roller*? A. I can't recall. *It doesn't matter a bit*. You can put them any way you want to.

Q. *Did you ever do it that way*? A. *I can't recall.* [Tr. p. 99.]

* * * * *

“Q. *Will you swear you did not make them that way*? A. *No, I won't*.

Q. You won't swear to that. *Will you swear you did not make rollers with longitudinal cutters on the roller that had the pockets in that machine for the Riviera Packing Company*? A. *I won't swear to that either*.

Q. *You won't swear you did not*? A. *No*. Why should I swear when I am not positive? I am not that kind.” [Tr. p. 100.]

With the positive testimony of the plaintiff-appellee, Barili [Tr. pp. 69-70 and 83-84], the testimony of the witness Cortopassi [Tr. pp. 88-89] and the testimony of the witness Gierth [Tr. pp. 66-67], concerning the construction of the rollers of the Marlo machine, Defendants' Exhibit B, and defendant-appellant Bianchi's failure to

deny that he made such roller construction, the plaintiff-appellee proved by a preponderance of evidence, infringement of claim 4 of the patent in suit by the defendant-appellant, Bianchi, in building and selling the Marlo machine to the defendant-appellant, Marlo Packing Corporation.

If there could be any doubt as to the proof of infringement of claim 4 of the patent in suit by the interrogatories of the defendant and answers thereto, including the interrogatory print, such doubt is resolved conclusively in favor of the plaintiff-appellee, Barili, by the *Defendants' Exhibit B* [Tr. p. 107], which shows the Marlo ravioli machine built by the defendant-appellant, Bianchi, and sold by him to the defendant-appellant, Marlo Packing Corporation, which used said machine.

The defendant-appellant, Bianchi, testified that there must be cutters to separate the ravioli, and that it is immaterial how or where the cutters are placed on the rollers, because they will work just the same [Tr. pp. 101, 99 and 97]. If it is immaterial where the cutters are placed on the rollers, the transposition of the axial cutters 15 and 16 on the mold roller 11 of the patent in suit (Fig. 4) to the other roller 12 with the annular cutters, as shown in the photographs of the Marlo machine [Defendants' Exhibit B: Tr. pp. 98 and 107], would amount to nothing more than a mechanical equivalent of the rollers shown, described and claimed in claim 4 of the patent in suit, and such equivalent constitutes an infringement of said claim 4 of the patent in suit.

The Marlo machine [Defendants' Exhibit B] is a Chinese copy of the plaintiff's ravioli machine, as covered by claim 4 of the patent in suit, with the exception of the transposition of the *axial* cutters from the roller 11 with

molds or pockets to the other roller 12 on which the *annular* cutters are located. Such transposition of the axial cutters is a mechanical equivalent of the novel combination of elements of claim 4 of the patent in suit and is an infringement of said claim jointly and severally by the defendants, Achille Bianchi and Marlo Packing Corporation.

“Changing the relative position or reversal of the parts of a machine or manufacture does not avert infringement, where the parts transposed perform the same respective functions after the change as before. (Adams v. Mfg. Co., 3 Bann. & Ard. 1, Fed. Cas. No. 56 (1877); Devlin v. Paynter, 64 Fed. 398 (1844)).” and other cases cited.

Walker on Patents (Deller’s Ed.), Vol. 3, Sec. 463, pp. 1699-1700.

“There are two tests of equivalency; (a) identity of function; (b) substantial identity of way in performing that function.”

Walker on Patents (Deller’s Ed.), Sec. 466, p. 1703.

The Marlo machine, as shown in Defendants’ Exhibit B [Tr. pp. 97-98 and 107], meets those tests of equivalency perfectly, because the Marlo machine performs the identical function of the appellee Barili’s machine in making ravioli, and performs that function in substantially the identical way as the Barili machine with forming-and-cutting rollers that are identical to the Barili rollers, with the exception of the transposition of the axial cutters from

one roller to the other in the Marlo infringing machine, which transposition does not change the operation of the machine [Tr. pp. 97, 99].

“No substitution of an equivalent for any ingredient of a combination covered by any claim of a patent can avert the charge of infringement of that claim (O’Reiley v. Morse, 15 How. (56 U. S. 61, 62 (1853)) (and other cases cited), whether or not the equivalent is mentioned in the patent. Treibacher Chemisch Works Co. v. Rossler & Hasslacher Chemical Co., 219 Fed. 210 (1914).”

Walker on Patents (Deller’s Ed.), Vol. 3, Sec. 464, pp. 1700-1701.

An important test, in determining the question of infringement of a patent, is *interchangeability* or non-interchangeability of parts of a patented machine and the parts of the alleged infringing machine. *The forming-and-cutting rollers of the appellants’ ravioli machine* being substantially identical to the corresponding rollers of the appellee’s machine, the appellants’ rollers, *if placed in the appellee’s machine, would operate the same and perform identically* the same function as the appellee’s rollers in making ravioli.

Walker on Patents (Deller’s Ed.), Sec. 470, p. 1708;

Miller v. Eagle, 151 U. S. 186, 38 L. Ed. 121, 14 S. Ct. 310.

In the Brief for Defendants-Appellants, page 19, it is incorrectly asserted that claim 4 of the patent in suit is further limited to a structure wherein the rollers are in contact with one another, while in defendants’ machine the rollers are separated appreciably from one another.

Claim 4 of the patent in suit specifies the other roller being made with annular peripheral cutters *adapted to be positioned* between the molds of the first roller *at the point of contact of the rollers*. The phrase "*adapted to be positioned*" in claim 4 means that the *rollers are adjustable* toward or away from each other at the *point of contact of the annular cutters 13 and 14 of roller 12 with the surface of roller 11* between the molds, as shown in Figs. 1 and 4 of the drawings of the patent in suit. Such adjustment is supported by the specification of the patent in suit, page 2, lines 4-7, which states:

"The two rollers 11 and 12 are *adjustably* fixed so close together that the two sheets of paste are very firmly pressed together."

The rollers of the defendants-appellants' machine, Defents' Exhibit B, are likewise *adjustable* toward or away from each other *at the point of contact* of the cutters of one roller with the surface of the other roller. The witness Cortopassi testified [Tr. p. 89], concerning the rollers of the defendants-appellants' machine, Defendants' Exhibit B, as follows:

"Q. One of the rollers had pockets in it, had square molds in it, depressions? A. Yes.

Q. One roller? A. One is support. Another to adjust, like go back.

Q. One roller is *adjustable*? A. *One is adjustable.*"

Adjustability of the rollers of the Bianchi-Marlo machine is illustrated in Defendants' Exhibit B, photograph E, but the adjustment shown in said photograph shows the forming and cutting rollers *adjusted out of their normal operative position* whereby the rollers are "*separated*

appreciably from one another,” to support said incorrect statement appearing on page 19, lines 11 and 12, of the Brief for Defendants-Appellants, in an attempt to set up an *artificial difference* between the positioning and operation of the rollers of the machines of the opposing parties to this suit. The adjustment of the rollers illustrated in Photograph E shows a space between the rollers too wide for the rollers to coact in order to make ravioli. The rollers in the defendants-appellants’ machine, as well as in the plaintiff-appellee’s machine, *must be adjusted very close together with the cutters on one roller in contact with the surface of the other roller*, so that the wide marginal flanges of the two thin sheets of dough of the ravioli will be compressed firmly together by the rollers, to seal the ravioli, and the cutters will cut the square-shape ravioli from the two sheets of dough passing between the rollers. The adjustment of the rollers with the abnormally wide space therebetween shown in Photograph E, Defendants’ Exhibit B, is trick evidence, but we are satisfied that this Honorable Court will not be deceived by it.

An interesting piece of documentary evidence, which shows that appellant, Bianchi, was in collusion with Superba Packing Co., Ltd., a corporation, one of the defendants in this case before the lower Court, to steal appellee Barili’s invention covered by the patent in suit, is the Declaration of Interference by the Patent Office [Tr. p. 184], between the Barili application for the patent in suit and the application for patent of one Pietro Musio, who was at the time president of the Superba Packing Company, a co-partnership, predecessor of said defendant, Superba Packing Co., Ltd., a corporation. Said defendant Superba Packing Company, a co-partnership, at that time had one of the plaintiff Barili’s ravioli machines [Tr. pp.

103-104]. The interference claim, Count 1 of said Declaration of Interference, is identical with Claim 2 of the Barili patent in suit, and the defendant-appellant, Bianchi, copied the invention of the Barili patent in suit in building his infringing machines for Superba Packing Company and Marlo Packing Corporation, with the *wide* margins around the molds and the cutting means specified in said interference claim, which is claim 2 of the patent in suit [Tr. pp. 103-104]. The file wrapper of the patent in suit does not show what disposition was made of said interference in the Patent Office, but it was obviously determined in favor of the plaintiff-appellee, Barili, because the interference claim, Count 1, appears in the Barili patent in suit as claim 2. The fact that Bianchi took the first Barili ravioli machine sold to Superba Packing Company to his shop and dismantled it and painted numbers on the parts of said machine in order to copy the Barili machine and build an infringing machine which Bianchi sold to Superba Packing Company, characterizes Bianchi as a miserable counterfeiter and a wilful and wanton infringer of the patent in suit. [Tr. pp. 104 and 62.]

Infringement is a question of fact, and there is no showing that the holding of infringement by the lower Court is contrary to the *weight of the evidence*.

Walker on Patents (Deller's Ed.), Vol. 3, Sec. 450, p. 1680.

It is submitted that there is no ground for reversal of the lower court's holding of infringement of the patent in suit by the defendants-appellants.

Alleged Limitation of Action.

The six-year limitation included in R. S. 4921 (U. S. C., Title 35, Sec. 70) does not apply to evidence of infringement as a basis for an injunction, but applies only to evidence of profits and damages. The trial court and this Honorable Court *in this appeal* are concerned primarily with the question of infringement. The question of profits and damages is a matter for an accounting. The lower court properly ruled that evidence of infringement prior to six years before filing this suit was admissible as a basis for an injunction [Tr. p. 63].

The plaintiff-appellee, however, certainly proved by a preponderance of evidence that the defendants-appellants infringed the patent in suit within six years prior to the filing of this suit, and the plaintiff-appellee is accordingly entitled to an accounting of profits and damages, as well as an injunction.

Conclusion.

It is submitted that the plaintiff-appellee, Barili, made out his case of infringement in the lower court against the defendants-appellants, in accordance with the complaint; that the defendants-appellants failed to establish alleged invalidity of the patent in suit; that the judgment of the lower court should be affirmed, except as to Paragraph 5 thereof concerning profits and damages, from which paragraph of said judgment the plaintiff Barili in the lower court has taken an appeal to this Honorable Court; and that costs should be awarded the plaintiff-appellee.

Respectfully submitted,

ALAN FRANKLIN,
Attorney for Appellee, Barili.





TOPICAL INDEX TO REPLY BRIEF FOR PLAINTIFF-
APPELLANT, ARTHUR E. H. BARILI

	PAGE
Alleged limitation of action.....	4
Attorney's fee	8
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES

PAGE

Peters v. Hanger, 134 Fed. 586.....4, 7

STATUTES

Revised Statutes 4921 (35 U. S. C., Sec. 70).....4, 9

TEXTBOOKS

3 Walker on Patents (Deller's Ed.), Sec. 463, pp. 1699-1700..... 4

No. 11769

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARTHUR E. H. BARILI,

Plaintiff-Appellant,

vs.

ACHILLE BIANCHI and MARLO PACKING CORPORATION,
Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFF-APPELLANT
ARTHUR E. H. BARILI.

In the Brief for Defendants-Appellees, page 25, under the heading "Plaintiff-Appellant's Appeal," it is stated that the *attorneys of record* for plaintiff-appellant are and have been Alan Franklin of Los Angeles and Messrs. Boyken and Beckley of San Francisco. This is of course true at the present time and was true at the time of the regular trial of the case on March 11, 1947. However, it was not true on December 10, 1946, when the motion regarding the taking of a deposition was argued. In the paragraph at the bottom of page 25 and the top of page 26 it is stated that Mr. Beckley, as an attorney of record, should have taken the responsibility of determining the date of the trial, after having been informed that it had been set. The fact is, however, that at the time Mr. Beckley was not an attorney of record, but was only appear-

ing to represent the attorney of record for the plaintiff, Alan Franklin, at that particular hearing concerning taking of a deposition, and consequently at said hearing on December 10, 1946, when the date of the first and irregular trial, February 6, 1947, was mentioned, there was no attorney of record for the plaintiff present, and the responsibility, asserted by defendants' attorney, of Mr. Beckley to notify the plaintiff's attorney of record, Mr. Franklin, was nonexistent [see Affidavits, Tr. pp. 16-18].

It should be noted that the notice of appearance of the case on the Law and Motion Calendar for setting for trial, on December 2, 1946, is not directed to the attorney of record for the plaintiff [Tr: p. 7] and that the notice, that on December 2, 1946, the trial of the case had been ordered set for February 6, 1947, is likewise not directed to the attorney of record for the plaintiff [Tr. p. 8]. Only the defendants' attorneys are named in said notices and plaintiff's attorneys never received those notices or any other notices of the setting of this case for trial on February 6, 1947.

The trial on February 6, 1947, without notice to plaintiff's attorney of record, was most irregular to say the least.

On page 26, last paragraph, of the Brief for Defendants-Appellants, it is argued that "Counsel for plaintiff proceeded with the trial in the usual manner *without in any manner objecting to the short notice or to his inability to secure witnesses or to his lack of time to prepare for a trial.*" What else could counsel for the plain-

tiff do but to proceed with the trial of the case, under the most adverse conditions, when the trial court had arbitrarily made its order setting the case for trial on March 11, 1947, the day after plaintiff's attorney arrived in San Francisco from Los Angeles and argued his Motion for Relief From Judgment and to Reset for Trial [Tr. pp. 15, 19 and 44]. Orders are Orders and it is incumbent upon attorneys to comply with court orders, no matter how unreasonable or arbitrary they may be. It should be obvious to this Honorable Court that on such short notice of trial to counsel for plaintiff, who went to San Francisco on March 10, 1947, to argue a motion for relief from an irregular judgment, with no idea or inkling of having to go to trial of the case on less than a day's notice, that in such short time it was impossible to subpoena the books of the defendants and go over them with an accountant to prove *considerable damages* suffered by the plaintiff, by reason of the wilful and wanton infringement by the defendants of the plaintiff's patent in suit. The best that counsel for plaintiff could do in such short time allowed him was to locate two hostile witnesses, Gierth and Cortopassi [Tr. pp. 66 and 88] and get out subpoenas for them to testify to facts concerning infringement, only, of the patent in suit. Said witnesses were not bookkeepers or accountants and could give no accurate testimony concerning damages to plaintiff-appellant by reason of defendants-appellees' infringement of the patent in suit.

Alleged Limitation of Action.

R. S. 4921 (U. S. C., Title 35, Sec. 70).

The defendants' appellees' witnesses were obviously coached as to the six-year limitation applicable to damages, only, in R. S. 4921, but said witnesses *forgot their lines* in places, and their testimony on the whole was preponderantly to the effect that defendants-appellees infringed the patent in suit *within six years* prior to the filing of this suit on October 19, 1946, and consequently the defendants-appellees failed to carry the *burden of proving* the six-year statute of limitations applicable to damages in patent infringement suits. *The burden of proof is upon the party who pleads the statute of limitations.*

Peters v. Hanger, 134 Fed. Rep. 586.

Bianchi testified [Tr. pp. 98-99] as follows:

“Q. * * * Within the last six years, have you made any different from that? A. Yes, I made some rollers with the pocket, the margin, and the cutter all in one roller.”

Such a roller with pockets (molds), margins and cutters all on one roller was a mechanical equivalent of the rollers included in claim 4 of the patent in suit, because it is immaterial where the cutters are placed on the rollers according to Bianchi's testimony [Tr. pp. 97-99].

“Changing the relative position or reversal of parts of a machine or manufacture does not avert infringement.”

Walker on Patents (Deller's Ed.), Vol. 3, Sec. 463, pp. 1699-1700.

Bianchi afterwards testified that he made no ravioli machines in the last six years. Such contradictory testimony of a *party* to the suit, Bianchi, fails to carry the burden of proving the statute of limitations.

Plaintiff-Appellant, Barili, testified that in the summer of 1946 he had a conversation with the witness Herbert Gierth, superintendent of the defendant-appellee, Marlo Packing Corporation [Tr. pp. 66 and 68], in which conversation Gierth stated that said defendant-appellee did not need any machinery for ravioli; that they had a ravioli machine made by the defendant-appellee, Bianchi, exactly like the ravioli machine of the Barili patent in suit, and twice as wide; and that Marlo Packing Corporation had not been using said Bianchi machine for "*five or six months*" prior to the summer of 1946 when the conversation between Barili and Gierth took place [Tr. pp. 68-71]. The statement of Gierth, in the above conversation with Barili, in the summer of 1946 indicates that defendant-appellee, Marlo Packing Corporation, used the infringing Bianchi-Marlo ravioli machine *up to within six months before said conversation* in the summer of 1946, which would bring the infringing use of said machine by Marlo Packing Corporation within the *six year* statute of limitations (R. S. 4921) before filing this suit on October 19, 1946 [Tr. p. 4].

The plaintiff-appellant, Barili, had sold one of his patented ravioli machines to defendant-appellee, Marlo Packing Corporation, about 1933, *but he lost the sale* of another of his machines to said defendant-appellee, because of the sale, by the defendant-appellee, Bianchi, of his infringing machine [Deft. Ex. B] to Marlo Packing Corporation [Tr. pp. 67, 69, 71, 92, 97, and 107]. Such evidence of plaintiff-appellant's loss of a sale of his ma-

chine within the six-year statute of limitations, by reason of the sale by the defendant-appellee, Bianchi, of one of his infringing machines to Marlo Packing Corporation, and the admitted infringing use of said infringing machine [Deft. Ex. B] by defendant-appellee, Marlo Packing Corporation within the six-year statute of limitations, was *proof, at the trial, of damages* to the plaintiff-appellant, Barili, and it was gross error on the part of the trial judge in not assessing the damages or ordering an accounting before a master for such assessment.

The witness Herbert Gierth testified [Tr. p. 67] as follows:

“Q. Did you state you had bought one machine four or five years ago like Mr. Barili’s machine, only twice as wide? A. I told him we bought this ravioli machine from Mr. Bianchi shortly before the war broke out. This machine probably has been in use about *half a year prior to the outbreak of the war*, and then we discontinued it, because we are going into Army and Navy contracts.”

The witness Cortopassi corroborated Gierth [Tr. pp. 88-89] as follows:

“A. The machine was for Marlo Packing Company.

Q. It was built in Bianchi’s shop? A. Bianchi’s shop.

* * * * *

Q. About what date was that, do you remember?
A. The date?

Q. Yes. A. *Before the war*, I guess, *six or seven months.* * * *

The outbreak of the war in the United States was December 7, 1941, and six months before that date was June 7, 1941. Six years before filing this suit, on October 19, 1946, was October 19, 1940. The building of the Marlo machine by Bianchi and the using of the machine by Marlo was within the six years statute of limitations and said defendants-appellees are liable for damages for infringement of the plaintiff-appellant's patent.

The burden of proving the six-year statute of limitations being on the defendants-appellees has not been carried, and this defense falls to the ground.

Peters v. Hanger, 134 Fed. Rep. 586.

The use of the Bianchi machine [Deft. Ex. B] by the defendant-appellee, Marlo Packing Corporation, "*about half a year* prior to the outbreak of the war" (on Dec. 7, 1941), as testified to positively by the witness Gierth [Tr. p. 67], was within the six-year statute of limitations, and the use of said infringing machine for that length of time certainly must have netted the defendant-appellee, Marlo Packing Corporation, a handsome profit, in view of the fact that the machine of the infringed patent in suit is an automatic continuous mass production ravioli machine, *which is at least twelve times faster than any other ravioli producing machine*. This is certainly a matter for an accounting of profits and damages.

The appellees have not only failed to carry the burden of proof that they did not infringe the patent in suit

within six years prior to the filing of this suit, but the evidence clearly shows that such infringement did in fact take place within the period of the statute of limitations, and the appellant, Arthur E. H. Barili, has made out a *prima facie* showing of substantial damages by reason of said infringement of his patent, for which he is entitled to an accounting.

Attorney's Fee.

The failure of the lower court to award the appellant, Arthur E. H. Barili, a reasonable attorney's fee, in view of the wilful, wanton and aggravated infringement of his patent, over a long period of years, by the unscrupulous appellees, who by such infringement have largely robbed the appellant, Barili, of the fruits of his genius, is in marked contrast to said court's award of a substantial attorney's fee to said appellees, at the irregular one-sided trial of this case on February 6, 1947, without notice to the appellant, Barili, and without due process of law [Tr. pp. 14-15]. If the discretion of the lower court was properly exercised, at said irregular first trial, in awarding an attorney's fee to such unconscionable infringers as the appellees, said court very crudely abused its discretion at the regular trial of the case on its merits, in not awarding a reasonable attorney's fee to the appellant, Arthur E. H. Barili, who has revolutionized the ravioli manufacturing industry by his meritorious invention, and has made a valuable contribution to the science and economy of our country.

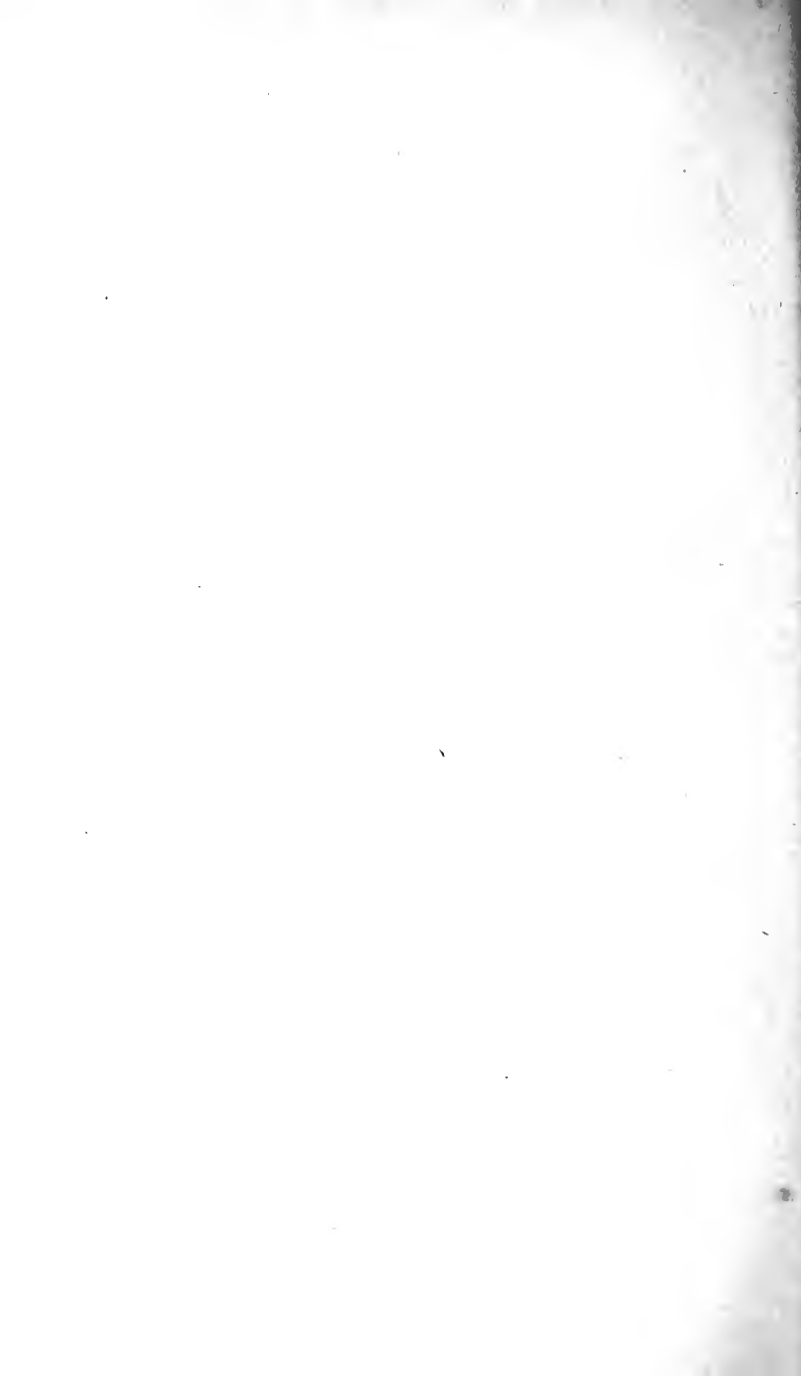
Conclusion.

In conclusion it is submitted that *paragraph 5* of the Final Judgment of the lower court should be reversed; that an *accounting* of the *damages* sustained by the appellant, Arthur E. H. Barili, by reason of the unlawful infringement of his patent in suit by the appellees should be ordered; that such damages should be *trebled* in view of the wilful nature of such infringement; and that appellant Barili should be awarded his costs and a *reasonable attorney's fee*, pursuant to R. S. 4921, (U. S. C., Title 35, Sec. 70).

Respectfully submitted,

ALAN FRANKLIN,

Attorney for Appellant, Arthur E. H. Barili.



No. 11769

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARTHUR E. H. BARILI,

Plaintiff-Appellant,

vs.

ACHILLE BIANCHI and MARLO PACKING CORPORATION,

Defendants-Appellees.

PETITION FOR REHEARING.

ALAN FRANKLIN,

356 South Spring Street, Los Angeles 13,

BOYKEN, MOHLER & BECKLEY,

W. BRUCE BECKLEY,

723 Crocker Building, San Francisco,

Attorneys for Plaintiff-Appellant, Arthur E. H. Barili.

FILED

JUL 15 1948



TOPICAL INDEX

PAGE

I.

The court erred in not reversing the lower court for failing, first, to enter an interlocutory judgment in favor of the plaintiff-appellant, holding the patent in suit valid and infringed, and referring the case to a master to take and state an account of damages before entering a final judgment, in accordance with the long-established equity practice and the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70).....	2
---	---

II.

Affirmation by this Honorable Court of that part of the judgment of the lower court denying the plaintiff damages, will abolish the interlocutory hearing, the interlocutory decree ordering an accounting of damages, and the accounting of damages, in patent infringement suits in equity; will require the plaintiff in such suits to prove his damages at the trial, as in actions at law; and will deprive the plaintiff of an adequate remedy in equity, in proving damages for infringement of his patent; all contrary to over a century of federal equity practice, and contrary to the existing equity practice of all other circuits of the National Federal Judicature and contrary to the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70).....	8
Conclusion	10

TABLE OF AUTHORITIES CITED

CASES	PAGE
Garretson v. Clark, 111 U. S. 120.....	4
O'Cedar Corporation v. F. W. Woolworth Co., 73 F. (2d) 366	4
Peters v. Hanger, 134 Fed. 586.....	7

STATUTES

Act of August 1, 1946, Pub. Law No. 587, 79th Cong., Sec. 4921, R. S. (35 U. S. C., Sec. 70).....	8, 10
Federal Rules of Civil Procedure, Rule 34.....	7
Revised Statutes, Sec. 4919.....	5
Revised Statutes, Sec. 4921.....	2, 5, 8

TEXTBOOKS

8 California Jurisprudence, Sec. 1, p. 731.....	5
8 California Jurisprudence, Sec. 5, p. 736.....	5
8 California Jurisprudence, Sec. 6, p. 736.....	5
25 Corpus Juris Secundum, p. 458.....	5
Walker on Patents (Deller's Ed.), Sec. 607, pp. 1903-1904.....	3
Walker on Patents (Deller's Ed.), Vol. 3, Sec. 610, p. 1911.....	3
Walker on Patents (Deller's Ed.), Vol. 3, Sec. 617, p. 1919.....	3
Walker on Patents (Sixth Ed.), Sec. 669, p. 745.....	3

No. 11769

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ARTHUR E. H. BARILI,

Plaintiff-Appellant,

vs.

ACHILLE BIANCHI and MARLO PACKING CORPORATION,
Defendants-Appellees.

PETITION FOR REHEARING.

*To the Honorable, the Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

Comes now the appellant and petitions this Honorable Court for a rehearing of the question of damages in this case upon the grounds hereinafter set forth.

Appellant conscientiously believes that this Honorable Court, in its opinion filed June 15, 1948, affirming the judgment of the lower court in its entirety, labored under misapprehension of the patent law governing the long-established practice of assessing damages in suits in *equity* for infringement of letters patent for inventions. Such misapprehension was evidently due to an oversight of the fundamental difference between the practice in actions at law and the practice in actions in equity in assessing damages in patent infringement cases, and to the fact that appellant's counsel failed to present more clearly and adequately the equity practice in assessing damages in such cases.

Appellant, however, feeling aggrieved at the opinion of this Honorable Court, respectfully, but forcefully, urges that a rehearing of the question of damages in this case be granted upon the following grounds:

I.

The Court Erred in Not Reversing the Lower Court for Failing, First, to Enter an Interlocutory Judgment in Favor of the Plaintiff-Appellant, Holding the Patent in Suit Valid and Infringed, and Referring the Case to a Master to Take and State an Account of Damages Before Entering a Final Judgment, in Accordance With the Long-Established Equity Practice and the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70).

The entry of the *final* judgment of the lower court, adjudging that plaintiff shall recover no damages from the defendants by reason of their infringement of the patent in suit, without first conducting an *interlocutory hearing* and entering an *interlocutory judgment* adjudging the patent valid and infringed, and ordering an assessment of damages, in accordance with the established equity practice and said Sec. 4921, R. S., was a gross error of the lower court and a grave injustice to the plaintiff-appellant. The question of damages, involving the six-year statute of limitations, is not an issue at the *trial* of the case, in a suit in *equity* for infringement of letters patent for an invention. The whole question of damages becomes an issue, only, after the interlocutory hearing.

“until after the interlocutory hearing, the complainant need introduce no evidence relevant to profits or to damages (Underwood Co. v. Elliott-Fisher Co., 171 Fed. 116).

“When the complainant has some evidence tending to show the character of the defendant’s doings, and that those doings infringe the complainant’s patent, a court of *equity* has power to order the defendant to allow the complainant, or some expert or other person representing him, to inspect the defendant’s doings for fuller accuracy of knowledge.”

Walker on Patents (Deller’s Ed.), Vol. III, Sec. 610, p. 1911.

“An interlocutory hearing by a judge, in a patent action in equity, is one which occurs after the evidence relevant to the validity of the patent and its infringement by the defendant has been taken, and before the case is referred to a master to take and state an account of profits and damages. The *final* hearing, which occurs after the master has taken that account and filed his report, generally involves nothing but the correctness of that report. * * * The interlocutory hearing is generally the pivotal point of a litigation. Where it results in the success of the defendant and consequent dismissal of the bill, it becomes a final hearing. If the court enters an interlocutory decree it can at any time before final decree modify or rescind it and a rehearing may be sought at any time before the final decree is entered provided due diligence be employed and a revision be otherwise consonant with equity.”

Walker on Patents, Sixth Ed., Sec. 669, p. 745, and Deller’s Ed., Sec. 607, pp. 1903-1904;

Walker on Patents (Deller’s Ed.), Vol. III, Sec. 617, p. 1919.

The case of *Garretson v. Clark*, 111 U. S. 120, cited in the opinion of the lower court, followed the correct traditional equity practice in trying only the issues of validity and infringement of the patent in suit, and, in its *interlocutory* decree, referring the matter of an accounting of damages to a master, who reported that the plaintiffs had suffered no damages. The court sustained the master's report and in its final decree *allowed the plaintiffs nominal damages*.

This Honorable Court misinterpreted the case of *O'Cedar Corporation v. F. W. Woolworth Co.* (C. C. A. 7), 73 F. (2d) 366. In said case the court, in stating that it is better practice to try the issues determinative of liability, and refer matters of accounting to the master, did not hold and did not mean that the *court* should rule on the question of whether any particular infringement was within six years prior to the filing of the suit, because such question is for an *accounting*. The court in said case, in referring to issues which determine liability, referred only to the issues of validity and infringement of the trademark in suit, which issues do not include the question of whether any infringement was committed within six years prior to filing suit. To determine liability in a suit in equity for patent infringement it is only necessary for the court to determine that only *one* infringing machine was made, used or sold by the defendant, at any time between the date of the patent in suit and the date of the trial. Such a determination by the court entitles the plaintiff to an injunction and to damages. Upon determination, at an interlocutory hearing, of one infringement at any time between the date of the patent and the trial, the court should enter an interlocutory judgment holding the patent in suit valid and infringed, and ordering an assessment of

damages, either by the court or by a master, according to Sec. 4921, R. S., as amended August 1, 1946.

At the trial counsel for the defendant objected to evidence of infringement more than six years prior to the filing of the suit, on the grounds that the six-year limitation (Sec. 4921, R. S.) was a bar to the action, but his objection was overruled [Tr. p. 63]. Sec. 4921, R. S., is not a statute of limitation, either at law or in equity, because said statute is not a bar to an action for patent infringement, but only limits recovery of *actual* damages to infringements committed within six years prior to the filing of the action. An *action at law* for damages for patent infringement may be brought under Sec. 4919, R. S., and a judgment rendered for *nominal* damages if no *actual* damages are proved. *Some damages* must be awarded to support a judgment for patent infringement, and it was gross error of the lower court in awarding *no damages* whatever to the plaintiff-appellant.

“Some damages must be awarded to determine the right.”

25 Corpus Juris Secundum, p. 458.

“Although the thought of *compensation* is fundamental in the conception of damages, the term includes *nominal* damages, exemplary or vindictive, and double or treble damages.”

8 Cal. Jur., Sec. 1, p. 731.

See also:

8 Cal. Jur., Secs. 5 and 6 (p. 736).

The testimony *at the trial*, as to whether any particular infringement was committed within six years prior to filing suit, is of no probative value in determining damages in this suit in *equity* for patent infringement, because in such suits the plaintiff does not have to prove a single fact relevant to damages other than *infringement* at any time during the term of the patent, which *infringement by itself establishes liability for damages*, the amount of which being left for determination upon further proceedings. such as an accounting by a master, at which proceeding the plaintiff is entitled to be present and to prove *additional* infringements to those proved at the trial. The lower court, *without an accounting*, in rendering a *final* judgment denying damages merely upon such infringement as plaintiff was able to present at the trial, upon the unjustifiably short notice of trial given to plaintiff by the court, deprived the plaintiff of his right to prove additional infringements and substantial damages, in accordance with time-honored equity practice in patent infringement suits. The lower court tried this case as an action at *law*, in so far as damages were concerned, which have to be proved at the trial of such cases, and not as an action in *equity* requiring an accounting of damages; and this is an action in *equity*. The judgment of the lower court, denying the plaintiff damages on the evidence produced at the trial, is accordingly grossly irregular, and flies in the face of over a century of *equity* practice concerning damages in patent litigation.

The case of *Peters v. Hanger* (C. C. A. 4), 134 Fed. 586, 590, was an *action at law* and applies to this action in *equity* only in its ruling that the burden of proving that an infringement of a patent occurred more than six years prior to filing the action, rests upon the *defendant*. Said case does not support the lower court's irregular judgment in denying the plaintiff an accounting of damages and denying the plaintiff damages merely on the *conflicting oral* evidence at the *trial* concerning the *time* of infringement of only *one* machine. It is still urged, in view of the *conflicting oral* evidence regarding infringement, within the statutory period, by the defendants' machine, introduced in evidence at the *trial*, that the defendants failed to carry the burden of proving that infringement by said machine occurred more than six years prior to filing of this suit; and the finding of fact (4) of the lower court that the plaintiff produced no evidence of damage at the *trial* was contrary to the *weight* of the evidence and should be reversed by this Honorable Court. The fact that the defendants failed to produce any records or other *documentary* evidence to prove that their infringement occurred more than six years before filing this suit, should be taken most strongly against them, because they should be in possession of such evidence, while it was not possible for the plaintiff to produce the defendants' records or documentary evidence by motion under Rule 34, F. R. C. P., or otherwise, when plaintiff was taken by surprise by the short notice of trial given by the court, of less than a day.

II.

Affirmation by This Honorable Court of That Part of the Judgment of the Lower Court Denying the Plaintiff Damages, Will Abolish the Interlocutory Hearing, the Interlocutory Decree Ordering an Accounting of Damages, and the Accounting of Damages, in Patent Infringement Suits in Equity; Will Require the Plaintiff in Such Suits to Prove His Damages at the Trial, as in Actions at Law; and Will Deprive the Plaintiff of an Adequate Remedy in Equity, in Proving Damages for Infringement of His Patent; All Contrary to Over a Century of Federal Equity Practice, and Contrary to the Existing Equity Practice of All Other Circuits of the National Federal Judicature, and Contrary to the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70).

No authority has been cited requiring the plaintiff to prove his damages at the *trial* of a suit in *equity* for patent infringement, and the Act of August 1, 1946, Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70) contains no such requirement. Said act, in amending Sec. 4921, R. S., made no change in said section other than to abolish profits and limit recovery to general damages for patent infringement, and to authorize the court in its discretion to award reasonable attorney's fees to the prevailing party in patent infringement suits in equity. The equity practice in determining damages on an *accounting*, in suits in equity for patent infringement, which has existed in the Federal courts since the inception of the American patent system, and

which still exists in all Federal Circuits, except possibly this Circuit, in view of the present decision of this case, has not been abolished by *statute*; and for this Honorable Court to abolish said practice in this Circuit, in the face of its rich and honored tradition, by affirming the lower court's erroneous denial of damages to the plaintiff-appellant, would be revolutionary to say the least.

The reason why suits for patent infringement are brought in equity is because a patent owner has no adequate remedy at law, not only because an injunction can be granted only by a court of equity, but also because proof of damages at the *trial* of an action at law is too cumbersome and requires too much time. Some patent accountings require months of testimony before a master, whose time is nothing like as valuable as that a Federal Judge. Actions at law are seldom brought, except when the patent has expired and equity has lost jurisdiction, and when a jury trial is desirable in a suit for infringement of a design patent. If accountings are abolished and a plaintiff is required to prove *all* of his damages at the *trial*, the plaintiff will have no adequate remedy in *equity* for proving damages in a suit in equity for patent infringement. If accountings before a master are abolished and patent owners are required to prove their damages at the *trial* of a suit in equity for patent infringement, the Federal courts will be somewhat cluttered up with assessments of damages in patent infringement suits, as said courts, on a larger scale in the days of prohibition, were all cluttered up with liquor cases and cases of liquor.

Conclusion.

In conclusion it is submitted that a rehearing of the question of damages in the present case should be granted to the appellant, Arthur E. H. Barili, to the end that the practice of assessing damages be correctly determined as to said appellant, and as to patent litigants generally in this Circuit, in accordance with equity practice under Act of August 1, 1946. Public Law No. 587, 79th Congress, Sec. 4921, R. S. (U. S. C., Title 35, Sec. 70).

Respectfully submitted,

ALAN FRANKLIN,

Attorney for Appellant, Arthur E. H. Barili.

Certificate of Counsel.

I hereby certify that I am one of the counsel for the appellant and petitioner, and in my judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

ALAN FRANKLIN.

No. 11771

United States
Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM P. STUART, United States Collector
of Internal Revenue in and for the State of
Arizona,

Appellant,

vs.

HENRY ONG, President of Sun Kwung Tong
Company, an association; CHINESE CHAM-
BER OF COMMERCE OF PHOENIX, a
corporation; FRANK ONG, as Chairman of
the Wing Mae School in China, an association;
YEUN LUNG, Chairman of the Chinese
School of Phoenix, Arizona, an association;
and FRED WONG, Chairman of the Chinese
War Relief Association, an association,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States,
for the District of Arizona

FILED

JAN 6 1948



No. 11771

United States
Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM P. STUART, United States Collector
of Internal Revenue in and for the State of
Arizona,

Appellant,

vs.

HENRY ONG, President of Sun Kwung Tong
Company, an association; CHINESE CHAM-
BER OF COMMERCE OF PHOENIX, a
corporation; FRANK ONG, as Chairman of
the Wing Mae School in China, an association;
YEUN LUNG, Chairman of the Chinese
School of Phoenix, Arizona, an association;
and FRED WONG, Chairman of the Chinese
War Relief Association, an association,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

1910

1911

1912

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	20
Appeal:	
Notice of.....	53
Designation of Record on Appeal.....	54
Statement of Points to Be Relied on by Defendant on.....	55
Attorneys of Record.....	1
Certificate of Probable Cause.....	47
Civil Docket Entries.....	2
Clerk's Certificate to Transcript of Record....	58
—recross	99
Complaint	8
Deposition of Ung Too Thet, Alias Ong Kok Si	172
—direct	175
—cross	191
Designation of Record on Appeal.....	54
Findings of Fact and Conclusions of Law....	31
Conclusions of Law.....	39
Findings of Fact.....	31
Judgment	41

	INDEX	PAGE
Minute Entries:		
Approving Proposed Findings of Fact and Conclusions of Law.....		40
Extending Time to File Record and Docket Action in Circuit Court of Appeals.....		58
Order Amending Findings of Fact; Deny- ing Motion to Dismiss for Lack of Juris- diction		52
Order on Motion for New Trial.....		48
Order that Plaintiffs Have Judgment.....		30
Proceedings of Trial.....		27
Setting Case for Trial.....		26
Motion to Dismiss for Lack of Jurisdiction....		49
Affidavit of William P. Stuart.....		50
Motion for New Trial.....		43
Memorandum in Support of Motion for New Trial.....		44
Notice of Appeal.....		53
Order for the Taking of a Deposition.....		202
Order for Transmittal of Original Exhibit and Duplicate of Reporter's Transcript.....		55

INDEX	PAGE
Reporter's Transcript.....	60
Witnesses, Defendant's:	
Brewer, Bennett Y.	
—direct	168
Harman, W. J.	
—direct	134
—cross	138
Knapp, Fred	
—direct	151
—cross	154
Smith, Earl	
—direct	141
—cross	146
Stone, Freeman	
—direct	155
Whiteman, Chas. Michael	
—direct	149
—cross	150
Wong, Kenneth Q. N.	
—direct	158
—cross	166
Witnesses, Plaintiffs':	
Gong, Henry	
—direct	121
—cross	123
Hong, Gee Soot	
—direct	63
—cross	66

	INDEX	PAGE
Witnesses, Plaintiffs'—(Continued):		
Lung, Yuen		
—direct		128
—cross		130
Ong, Frank		
—direct		117
—cross		119
Ong, Henry		
—direct		69
—cross		72
Singh, Yee F.		
—direct		101
—cross		107
Toy, D. H.		
—direct		110
—cross		114
Wong, Fred		
—direct		81
—cross		90
—redirect		98
Statement of Points to Be Relied on by De- fendant on Appeal.....		55

ATTORNEYS OF RECORD

FRANK E. FLYNN,
United States District Attorney,

CHARLES B. McALISTER,
Assistant United States Attorney,
Phoenix, Arizona,
Attorneys for Appellant.

JERMAN and FLYNN,
Security Building,
Phoenix, Arizona.
Attorneys for the Appellees. [3*]

HENRY ONG, President of Sun Kwung Tong Company, an association; CHINESE CHAMBER OF COMMERCE OF PHOENIX, a corporation; FRANK ONG, as Chairman of the Wing Mae School in China, an association; YEUN LUNG, Chairman of the Chinese School of Phoenix, Arizona, an association; and FRED WONG, Chairman of the Chinese War Relief Association, an association,
 Plaintiffs,

vs.

WILLIAM P. STUART, United States Collector of Internal Revenue in and for the State of Arizona,

Defendant.

Civ. 804 Phx.

FILINGS-PROCEEDINGS

1946

- Feb. 1—File petition to take deposition before action.
- Feb. 2—File notice to take deposition before action.
- Feb. 25—Enter and file order for taking of deposition of Ung Too Thet.
- Mar. 1—File complaint for return of trust funds.
- Mar. 1—File praecipe for summons.
- Mar. 1—Issue summons and deliver to Jas. E. Flynn, Esq.

1946

- March 13—File summons returned by Marshal showing service on deft. W. P. Stuart and and Frank E. Flynn, U. S. Attorney.
- Mar. 15—File deposition of Ung Too Thet.
- Mar. 15—File exhibits referred to in deposition of Ung Too Thet.
- Sept. 9—File answer of defendant.
- Nov. 1—James Flynn present for pltf. Chas. McAlister present for deft. On stipulation counsel, order set for trial Tuesday, Jan. 14, 1947, at 10:00 o'clock a.m. and consolidate with Civ. 918 for trial.

1947

- Jan. 14—On regularly for trial. J. Flynn present for pltf. Chas. McAlister present for deft. Enter proceedings of trial: On stipulation of counsel, order allow parties call certain witnesses at this time, out of order. File pltf's. Exhibit A. Order recess at 10:00 a.m., Jan. 15, 1947.
- Jan. 14—File deft's. praecipe for issuance of subpoena duces tecum for Charles Wightman and Freeman Stone and Fred Knapp.
- Jan. 14.—Issue subpoenas duces tecum.
- Jan. 15—File deft's. praecipe for issuance of subpoena duces tecum for Louis A. Beattig and Ong Poy.
- Jan. 15.—Issue subpoenas duces tecum.

1947

- Jan. 15—On regularly for further trial: Parties and counsel all present pursuant to recess: Enter further proceedings of trial. File pltf's. Exhibits A, B, C, and D. Order allow pltf. amend pleadings to conform with testimony. Order case submitted on memo. Order allow pltf. 10 days to file opening memo. Defts. 10 days to file answering memo. Pltfs. 5 days thereafter to file reply memo. [4]
- Jan. 20—File pltfs'. memorandum.
- Jan. 30—File def't's. memorandum.
- Jan. 31—File pltfs'. reply memorandum.
- Feb. 6—File subpoena duces tecum returned by Marshal showing service on Louis A. Beattig.
- Feb. 6—File subpoena duces tecum returned by Marshal showing service on Ong Poy.
- Feb. 6—File subpoena duces tecum returned by Marshal showing service on Freeman Stone and Fred Knapp.
- Feb. 6—File subpoena duces tecum returned by Marshal showing service on Charles Wightman.
- Feb. 24—This case having been submitted and by the Court taken under advisement, order judgment for pltfs. Order pltfs'. Exhibits A and C be returned to pltfs. in Civ. 918 Phx.
- Feb. 24—Issue notice to counsel.
- Feb. 28—File pltfs'. proposed Findings of Fact and Conclusions of Law.

1947

- Mar. 21—Docket proceedings had in Chambers at Portland, Oregon, Mon., March 17, 1947: Order pl'tfs'. Proposed Findings of Fact and Conclusions of Law approved and adopted as the Findings of Fact and Conclusions of Law herein and order pl'tfs'. Proposed Judgment be filed, entered and spread on the minutes as the judgment in this case.
- Mar. 21—Enter and file Findings of Fact and Conclusions of Law, dated March 17, 1947.
- Mar. 21.—Enter and file judgment for pl'tfs. Henry Ong \$1500.00, Chinese Chamber of Commerce \$838.40; Frank Ong, etc., \$1,914.00; Yeun Lung, etc., \$1,500.00; Fred Wong, etc., \$11,701.41, dated March 17, 1947, and enter notation thereof in Civil Docket.
- Mar. 21—Enter judgment in J.D. in sum of \$17,453.81.
- Mar. 21—Issue notice to counsel of entry of judgment, etc.
- Mar. 31—File deft's. motion for a new trial.
- May 8—Enter and file Certificate of Probable Cause and enter in J.D.
- May 8—Issue 2 cc. copies of Certificate of Probable Cause to U. S. Attorney.
- May 23—Deft's. motion for new trial having been heretofore submitted, it is ordered that said motion be granted as to the fourth cause of action and denied as to all remaining causes.

1947

May 23—Notify counsel of order of May 23, 1947.

May 26—File deft's. motion to dismiss case for lack of jurisdiction.

May 26—No appearance for pltf. McAlister for deft. McAlister now states respective counsel have stipulated that the numbers of the causes of action as shown on the Findings of Fact herein may be amended to conform to the causes of action as set out in the complaint and it is ordered that the Clerk amend said Findings of Fact accordingly, by interlineation. It is further ordered that the deft's. motion to dismiss for lack of jurisdiction, filed herein this date, be and it is denied. Counsel for deft. now states that counsel for ptfs. has requested that the fourth cause of action of the complaint herein be dismissed without prejudice and it is ordered that said fourth cause of action be and it is dismissed with prejudice.

May 26—Issue notice to counsel of proceedings
May 26, 1947.

Aug. 7—File deft's. notice of appeal (U.S.A. \$5.00).

Aug. 7—File reporter's transcript in duplicate.

Aug. 7—Mail duplicate copy of notice of appeal to Jerman and Flynn, counsel for ptfs.

1947

- Aug. 7—File deft's. designation of record on appeal.
- Aug. 26—Enter and file order for transmittal of original Exhibit B and duplicate transcript to Circuit Court of Appeals, dated and signed at Los Angeles, Calif., August 25, 1947.
- Aug. 26—File deft's. statement of points to be relied on by defendant on appeal.
- Sept. 10—Order extend appellant's time for filing the record on appeal and docketing the action in the U. S. Circuit Court to and including Nov. 5, 1947.
- Sept. 10—Issue notice to counsel.
- Oct. 24—Forward transcript of record on appeal to Circuit Court of Appeal, together with original of pltf's'. Exhibit B, and duplicate of reporter's transcript (U.S.A. \$22.00). [6]

In the United States District Court
for the District of Arizona

No. Civ. 804-Phx.

HENRY ONG, President of Sun Kwung Tong
Company, an association; CHINESE CHAM-
BER OF COMMERCE OF PHOENIX, a
corporation; FRANK ONG, as Chairman of
the Wing Mae School in China, an association;
YEUN LUNG, Chairman of the Chinese
School of Phoenix, Arizona, an association;
and FRED WONG, Chairman of the Chinese
War Relief Association, an association,
Plaintiffs,

vs.

WILLIAM P. STUART, United States Collector
of Internal Revenue in and for the State of
Arizona,

Defendant.

COMPLAINT

(Action for Return of Trust Funds)

Come now the above named plaintiffs by Jerman
& Flynn, their attorneys of record, and for cause
of action against the above named defendant, allege:

I.

That Henry Ong is president of Sun Kwung
Tong Company, an association duly organized, and
at all times hereinafter complained of was and is
now engaged in the merchandizing of Chinese goods,

wares and materials in the City of Phoenix, County of Maricopa, State of Arizona, and that he brings this action for and on behalf of the said association.

That the Chinese Chamber of Commerce is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona, and at all times hereinafter complained of, was engaged in the promotion of business, educational and recreational pursuits for the benefit of its members in the City of Phoenix, County of Maricopa, State of Arizona. [7]

That the Wing Mae School in China is an association organized for the purpose of securing donations and contributions for financial assistance and maintenance of Chinese schools located in the Republic of China; that Frank Ong, as chairman thereof, brings this action for and on behalf of said association.

That the Chinese School of Phoenix, Arizona, is an association organized for the purpose of promoting educational facilities and funds for the Chinese students in Chinese schools located in the City of Phoenix, County of Maricopa, State of Arizona, and that Yeun Lung as chairman thereof brings this action for and on behalf of said association.

That the Chinese War Relief Association is an association organized for the purpose of securing contributions of money and goods to aid in the relief of the Chinese people in the Republic of China, and that Fred Wong as chairman thereof brings this action for and on behalf of said association.

That the defendant is the duly appointed, qualified and acting United States Collector of Internal Revenue in and for the State of Arizona, and that at all times hereinafter complained of was acting in said capacity.

II.

That this action is one over which the above entitled court exercises original jurisdiction and that the amount of the subject matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

III.

That at all times hereinafter complained of Ung Too Thet, alias Ung Kok Si, was and is now an individual engaged in the operation of a mercantile business located at 113 East Madison Street, Phoenix, Arizona. [8]

IV.

First Cause of Action

That for a long time prior to the matters herein complained of, the Chinese War Relief Association had been engaged in the solicitation of funds from organizations and individuals. That the said solicitation was conducted for the purpose of securing funds to be used for the benefit of the homeless and destitute residents of the Republic of China. That in the solicitation of said funds various parades, dances and entertaining features of different types had been staged and conducted. That as

a result of the aforesaid activities on behalf of said association, the sum of Fourteen Thousand Dollars (\$14,000.00) had been collected. That on or before October 11, 1945, the said sum, and the whole thereof, was delivered to Ung Too Thet, alias Ung Kok Si, as treasurer of said association, at his place of business, 113 East Madison Street, Phoenix, Arizona, to be held in trust by the said Ung Too Thet, alias Ung Kok Si, for and on behalf of the said Chinese War Relief Association.

The aforesaid delivery of said sum was occasioned by the fact that the association did not have adequate facilities for the safe keeping thereof, and that since the outbreak of hostilities between the Imperial Government of Japan and the United States of America, it was impossible for said association to transmit the said fund, or any part thereof, to its corresponding association in the Republic of China.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the Fourteen Thousand Dollars (\$14,000.00), heretofore delivered to the said Ung Too Thet, as treasurer of the Chinese War Relief Association, to be held in trust for said association, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid Fourteen Thousand Dol-

lars (\$14,000.00) was seized by the arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safe keeping thereof, was not the owner thereof nor any part thereof, and was holding the same for and on behalf of the Chinese War Relief Association as trustee.

That subsequent to the seizure of said fund by the United States narcotic agents, at a date unknown to the plaintiff herein, the aforesaid fund, and the whole thereof, was seized by the above named defendant, and the plaintiff is informed and believes that the said fund, and the whole thereof, is in the possession of the defendant above named. That the plaintiff, Chinese War Relief Association, has demanded return of said fund from the above named defendant, and he has refused to deliver the same, or any part thereof, to the plaintiff.

V.

Second Cause of Action

That prior to the 11th day of October, 1945, the Wing Mae School in China, an association, acting through its chairman, Frank Ong, delivered to Ung Too Thet, as treasurer of said association, at his place of business, 113 East Madison Street, Phoenix, Arizona, the sum of One Thousand Nine Hundred Dollars (\$1,900.00). That said sum was the property of said association and was delivered to the said Ung Too Thet, alias Ung Kok Si, as treasurer as aforesaid, for safe keeping, and to be held by the said Ung Too Thet as trustee for said [10] association.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the One Thousand Nine Hundred Dollars (\$1,900.00), heretofore delivered to the said Ung Too Thet, as treasurer of the Wing Mae School in China, to be held in trust for said association, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid One Thousand Nine Hundred Dollars (\$1,900.00) was seized by the arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safe keeping thereof, and was not the owner thereof nor of any part thereof, and was holding the same for and on behalf of the Wing Mae School in China as trustee.

That subsequent to the seizure of said fund by the United States narcotic agents, at a date unknown to the plaintiff herein, the aforesaid fund, and the whole thereof, was seized by the above named defendant, and the plaintiff is informed and believes that the said fund, and the whole thereof, is in the possession of the defendant above named. That the plaintiff, Wing Mae School in China, has demanded return of said fund from the above named defendant, and he has refused to deliver the same, or any part thereof, to the plaintiff.

VI.

Third Cause of Action

That the Chinese School of Phoenix, Arizona, acting through its chairman, Yeun Lung, delivered to the said Ung Too Thet, alias Ung Kok Si, as treasurer of said association, at [11] his place of business, 113 East Madison Street, Phoenix, Arizona, the sum of One Thousand Five Hundred Dollars (\$1,500.00) to be held by the said Ung Too Thet, alias Ung Kok Si, as said treasurer, in trust for the benefit of said Chinese Schools of Phoenix, Arizona.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the One Thousand Five Hundred Dollars (\$1,500.00), heretofore delivered to the said Ung Too Thet, as treasurer of the Chinese Schools of Phoenix, Arizona, to be held in trust for said association, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid One Thousand Five Hundred Dollars (\$1,500.00) was seized by the arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safe keeping thereof, was not the owner thereof nor of any part thereof, and was holding the same for and on behalf of the Chinese Schools of Phoenix, Arizona, as trustee.

That subsequent to the seizure of said fund by the United States narcotic agents, at a date unknown to the plaintiff herein, the aforesaid fund, and the whole thereof, was seized by the above named defendant and the plaintiff is informed and believes that the said fund, and the whole thereof, is in the possession of the defendant above named. That the plaintiff, Chinese Schools of Phoenix, Arizona, has demanded return of said fund from the above named defendant, and he has refused to deliver the same, or any part thereof, to the plaintiff. [12]

VII.

Fourth Cause of Action

That prior to the 11th day of October, 1945, the Sun Kwung Tong Company, an association, acting through its agents and servants, had delivered to Ung Too Thet, alias Ung Kok Si, as treasurer of said association, at his place of business, 113 East Madison Street, Phoenix, Arizona, the sum of One Thousand Nine Hundred Dollars (\$1,900.00) to be held for and on behalf of said association; that the aforesaid money, and the whole thereof, was the property of said association, and the said Ung Too Thet, alias Ung Kok Si, as said treasurer, in holding the aforesaid fund, was acting as trustee for and on behalf of said association.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for viola-

tion of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the One Thousand Nine Hundred Dollars (\$1,900.00), heretofore delivered to the said Ung Too Thet, as treasurer of the Sun Kwung Tong Company, to be held in trust for said association was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid One Thousand Nine Hundred Dollars (\$1,900.00) was seized by the arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safe keeping, thereof, was not the owner thereof nor of any part thereof, and was holding the same for and on behalf of the Sun Kwung Tong Company as trustee.

That subsequent to the seizure of said fund by the United States narcotic agents, at a date unknown to the plaintiff [13] herein, the aforesaid fund, and the whole thereof, was seized by the above named defendant, and the plaintiff is informed and believes that the said fund, and the whole thereof, is in the possession of the defendant above named. That the plaintiff, Sun Kwung Tong Company, has demanded return of said fund from the above named defendant, and he has refused to deliver the same, or any part thereof, to the said plaintiff.

VIII.

Fifth Cause of Action

That prior to the 11th day of October, 1945, the Chinese Chamber of Commerce, a corporation, acting through its agents and servants, had delivered to Ung Too Thet, alias Ung Kok Si, as treasurer of said corporation, at his place of business, 113 East Madison Street, Phoenix, Arizona, the sum of Eight Hundred Dollars (\$800.00) to be held for and on behalf of said corporation; that the aforesaid money, and the whole thereof, was the property of said corporation, and the said Ung Too Thet, alias Ung Kok Si, as said treasurer, in holding the aforesaid fund, was acting as trustee for and on behalf of said corporation.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the Eight Hundred Dollars (\$800.00), heretofore delivered to the said Ung Too Thet, as treasurer of the Chinese Chamber of Commerce, to be held in trust for said corporation, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid Eight Hundred Dollars (\$800.00) was seized by the [14] arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safe keeping thereof,

was not the owner thereof nor of any part thereof, and was holding the same for and on behalf of the Chinese Chamber of Commerce as trustee.

That subsequent to the seizure of said fund by the United States narcotic agents, at a date unknown to the plaintiff herein, the aforesaid fund, and the whole thereof, was seized by the above named defendant, and the plaintiff is informed and believes that the said fund, and the whole thereof is in the possession of the defendant above named. That the plaintiff, Chinese Chamber of Commerce, has demanded return of said fund from the above named defendant, and he has refused to deliver the same, or any part thereof to the said plaintiff.

Wherefore, plaintiffs pray judgment:

That the above named defendant be directed and required to return to the Chinese War Relief Association the said fund of Fourteen Thousand Dollars (\$14,000.00), or in lieu thereof, said association do have and recover judgment of and from the defendant in a like sum.

That the above named defendant be directed and required to return to the Wing Mae School in China the said fund of One Thousand Nine Hundred Dollars (\$1,900.00), or in lieu thereof, said association do have and recover judgment of and from the defendant in a like sum.

That the above named defendant be directed and required to return to the Chinese Schools of Phoenix, Arizona, the said fund of One Thousand Five Hundred Dollars (\$1,500.00), or in lieu thereof, said association do have and recover judgment of and from the defendant in a like sum.

That the above named defendant be directed and required to return to Sun Kwung Tong Company the said fund of One Thousand [15] Nine Hundred Dollars (\$1,900.00), or in lieu thereof, said association do have and recover judgment of and from the defendant in a like sum.

That the above named defendant be directed and required to return to the Chinese Chamber of Commerce the said fund of Eight Hundred Dollars (\$800.00), or in lieu thereof, said corporation do have and recover judgment of and from the defendant in a like sum.

For such other and further relief as the court may deem equitable and just in the premises.

JERMAN & FLYNN,
By JAMES E. FLYNN,
Attorneys for Plaintiffs.

State of Arizona,
County of Maricopa—ss.

Walter Ong, being first duly sworn, upon his oath deposes and says:

That he is a resident of the State of Arizona, over the age of twenty-one years and competent to make oath; that he is now and has been acting as the agent and interpreter for each of the above named plaintiffs, and that he makes this affidavit for and on behalf of each of the plaintiffs above named; that he has read the foregoing complaint, and he knows the facts stated therein are true in

substance and in fact to his own knowledge, except those matters stated on information and belief and as to those he believes them to be true.

WALTER ONG.

Subscribed and sworn to before me this 28th day of February, 1946.

[Seal] JAMES E. FLYNN,
Notary Public.

My commission expires January 9, 1950. [16]

[Endorsed]: Filed March 1, 1946. [17]

[Title of District Court and Cause.]

ANSWER

Comes Now the above named defendant by Frank E. Flynn, United States Attorney for the District of Arizona, and Charles B. McAlister, Assistant United States Attorney, and in answer to the complaint filed herein, admits, denies and alleges as follows:

I.

In answer to Paragraph I of said complaint, defendant having no knowledge, information or belief sufficient to enable him to answer the allegations therein contained, denies each and every such allegation.

II.

In answer to Paragraph II defendant admits that the amount in controversy exclusive of interest and

costs exceeds the sum of Three Thousand Dollars (\$3,000.00), and that the Court has jurisdiction over the subject matter and the parties.

III.

In answer to Paragraph III defendant denies all material allegations therein contained. [18]

IV.

In answer to Paragraphs IV, V, VI, VII and VIII of said complaint, defendant admits that one Ung Too Thet, alias Ong Kok Si, as more fully appears herein from Paragraph V, was arrested by United States Narcotics agents, for violation of the Harrison Narcotics Act and of the Import and Export Drug Act, at his place of business, 113 East Madison Street, Phoenix, Arizona, on or about the 11th day of October, 1945, and that at the time of his arrest said agents seized certain monies which were in a safe belonging to the said Ung Too Thet, that thereafter pursuant to a deficiency assessment and levy made against Ung Too Thet by the Bureau of Internal Revenue, the said monies, then in the possession of said Narcotics agents, were seized by representative of this defendant in accordance with the provisions of the Federal Revenue laws; that a demand was made of this defendant for the return and release of all the funds he is alleged to hold illegally, but that this defendant refused and continues to refuse to return said funds for the reasons and on the grounds hereinafter set forth.

Further answering said Paragraphs IV, V, VI, VII and VIII, defendant denies that he has in his possession, or has seized, the sum of Fourteen Thousand Dollars (\$14,000.00), or any other sum, belonging to the Chinese War Relief Association; the sum of Nineteen Hundred Dollars (\$1,900.00), or any other sum, belonging to the Wing Mae School of China; the sum of Fifteen Hundred Dollars (\$1,500.00), or any other sum, belonging to the Chinese School of Phoenix; the sum of Nineteen Hundred Dollars (\$1,900.00), or any other sum, belonging to the Sun Kwung Tong Co.; or the sum of Eight Hundred Dollars (\$800.00), or any other sum, belonging to the Chinese Chamber of Commerce, but on the contrary alleges that all of said monies were seized by the Narcotics agents were the property of Ung Too Thet at the time of said seizure, being in his possession and subject to his personal control and use, and that the parties [19] plaintiff herein have no legal interest whatsoever in said funds.

Further answering said Paragraphs IV, V, VI, VII and VIII, this defendant has no knowledge, information or belief as to the truth of the allegations that the sums set forth, or any other sums, had been paid to the said Ung Too Thet by the organizations therein named for the reasons and under the conditions therein set forth, or for any other reasons or under any other conditions, and therefore denies each and every such allegation and demands that plaintiffs herein be required to make strict proof thereof.

V.

As a further defense and without waiving any defense hereinabove set forth, defendant alleges that the said Ung Too Thet, alias Ong Kok Si, was upon or about the 11th day of October, 1945, engaged in the illicit opium traffic at his regular place of business, 113 East Madison Street, Phoenix, Arizona; that he was at that time arrested by agents of the United States Narcotics Bureau and at the time of said arrest a search was made of his premises, at which time large amounts of raw and prepared smoking opium were discovered, as well as a safe containing some Thirty-five Thousand Dollars (\$35,000.00), in cash, including more than Three Thousand Dollars (\$3,000.00) in marked money belonging to the United States of America, together with checks and securities; that said monies and checks were seized as evidence by the said Narcotics agents along with the opium; that thereafter charges were filed against the said Ung Too Thet accusing him of violation of the Harrison Narcotics Act; that thereafter and on or about the 26th day of January, 1946, the said Ung Too Thet in Cause No. C-7335 Phx., entered a plea of guilty to the charge, whereupon imposition of sentence was suspended for five (5) years by the Court upon the condition that the said Ung Too Thet return to China within thirty (30) days.

That the said Ung Too Thet had failed to make a Federal Income Tax return for the years 1943 and 1944; that thereafter [20] agents of the Collector of Internal Revenue for the District of Arizona, believing that the said Ung Too Thet had received

taxable income during the said two years, after investigation determined that his taxable income for the year 1943 amounted to the sum of Thirteen Thousand Eight Hundred Seventy-eight and 66/100 Dollars (\$13,878.66), or thereabouts; that his net taxable income for the year 1944 amounted to the sum of Thirty-two Thousand Five Hundred Ninety-four and 97/100 Dollars (\$32,594.97); that the total liability on the above mentioned earnings for the two years amounted to Nineteen Thousand Nine Hundred Twenty-two and 67/100 Dollars (\$19,922.67), together with twenty-five per cent (25%) penalty in the sum of Four Thousand Nine Hundred Eighty and 66/100 Dollars (\$980.66) and interest to the 23rd day of October, 1945, in the amount of Nine Hundred Eighty-nine and 77/100 Dollars (\$989.77); that thereafter the defendant, under the authority of Sections 3612 and 3692, Title 26, U.S.C.A., assessed the said unpaid tax liabilities against the said Ung Too Thet and levied upon the monies then remaining in the hands of the said United States Narcotics agents, after the collection by them of the Narcotics Drug Tax on the opium found in the possession of the said Ung Too Thet; that notice of said deficiency assessment was mailed to the said Ung Too Thet by the Commissioner of Internal Revenue on the 29th day of November, 1945; that the determination of said unpaid tax liability, the subsequent deficiency assessment, levy and seizure of the monies in the possession of United States Narcotics agents was legal and proper; and that the said monies were legally the property of

the said Ung Too Thet and subject to such seizure under the laws of the United States.

Whereupon, having fully answered, defendant prays that plaintiff shall take nothing by his complaint; that the same shall be dismissed; that the defendant have his costs herein incurred, and for such other relief as may seem meet and proper in the [21] premises.

FRANK E. FLYNN,

United States Attorney,

District of Arizona.

/s/ CHARLES B. McALISTER,

Assistant U. S. Attorney.

State of Arizona,

County of Maricopa—ss.

Charles B. McAlister, being first duly sworn on oath, deposes and says:

That he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes; that he is an assistant to the United States Attorney for the District of Arizona; that he bases his information and belief upon information furnished him by the Bureau of Internal Revenue and the Bureau of Narcotics in the Treasury Department of the United States.

CHARLES B. McALISTER.

Subscribed and sworn to before me this 9th day of Sept., 1946.

[Seal]

GERTRUDE I. BITTING,

Deputy Clerk,

U. S. District Court for the

District of Arizona.

[Endorsed]: Filed Sept. 9, 1946.

In the United States District Court for the
District of Arizona (Phoenix Division)

October, 1946 term at Phoenix

Honorable Dave W. Ling,
United States District Judge, Presiding

[Title of Cause.]

Minute Entry of Friday, Nov. 1, 1946

SETTING CASE FOR TRIAL

James E. Flynn, Esquire, appears as counsel for the plaintiff. Charles B. McAlister, Esquire, appears as counsel for the defendant.

On stipulation of respective counsel,

Is Is Ordered that this case be and it is set for trial Tuesday, January 14, 1947, at ten o'clock a.m., and that this case be consolidated with Civ-918 Phoenix for trial.

In the United States District Court for the
District of Arizona, Phoenix Division

October, 1946 Term at Phoenix

Minute Entry of Tuesday, January 14, 1947

PROCEEDINGS OF TRIAL

Honorable Dave W. Ling, United States District
Judge, Presiding. Honorable Peirson M. Hall,
United States District Judge, Specially Assigned,
Presiding.

Civ-804

HENRY ONG, President of Sun Kwung Tong
Company, an association, et al,

Plaintiffs,

vs.

WILLIAM P. STUART, United States Collector
of Internal Revenue in and for the State of
Arizona,

Defendant.

Civ-918

GEE SOOT HONG, YEE WO & COMPANY,
TOM NOM AND FONG W. YUEY,

Plaintiffs,

vs.

WILLIAM P. STUART, United States Collector
of Internal Revenue in and for the State of
Arizona,

Defendant.

This case comes on regularly for trial this day.
James Flynn, Esquire, appears as counsel for the

plaintiffs. Charles B. McAlister, Esquire, Assistant United States Attorney, appears as counsel for the defendant. Louis L. Billar is present as official court reporter.

Both sides announce ready for trial.

On stipulation of counsel,

It Is Ordered that parties herein be allowed to call certain witnesses at this time, out of order.

Walter Ong is now sworn as Chinese Interpreter herein.

Plaintiffs Case

Gee Soot Hong is now sworn and examined on behalf of the plaintiffs.

Plaintiffs' Exhibit A, check, is now admitted in evidence.

Henry Ong is now sworn and examined on behalf of the plaintiffs.

W. J. Harmon is now sworn and examined for the defendant, out of order.

And thereupon, the further trial of this case is ordered continued to the hour of ten o'clock, a.m., January 15, 1947, to which time the parties and their counsel are excused. [24]

[Title of District Court and Cause.]

Wednesday, January 15, 1947.

The respective parties and their counsel are present and further proceedings of trial are had as follows:

Plaintiffs' Case (Continued)

Plaintiffs' Exhibit B, deposition of Ung Too Thet, is now admitted in evidence.

Walter Ong is now sworn as a witness for the plaintiffs.

Counsel now stipulate as to nature of testimony of plaintiff, Tom Nom, if said plaintiff testified as a witness herein, and stipulate that Ong Goack Si, Ung Too Thet and Ung Kok Si are one and the same person.

Plaintiffs' Exhibit C, check, is now admitted in evidence.

Fred Wong is now sworn and examined on behalf of the plaintiffs.

The following witnesses for the plaintiff are now sworn and examined:

Yee Sing	Henry Gong
Di H. Toy	Yeun Lung
Frank Ong	

And thereupon at the hour of 12:10 o'clock p.m., It Is Ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, to which time the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the parties and their respective counsel being present pursuant to recess, further proceedings of [25] trial are had as follows:

It Is Ordered that Plaintiffs' Exhibit D, account books, be admitted in evidence.

Plaintiffs rest.

Defendant's Case

The following defendant's witnesses are now sworn and examined: Earl A. Smith, Charles Wrightman, Fred Knapp, Freeman Stone, Kenneth O. N. Wong.

Counsel for the plaintiffs now moves for leave to amend the pleadings to conform with the proof as will fully appear in the reporter's notes, and

It Is Ordered that said motion be and it is granted.

Bennet Y. Brewer is now sworn and examined on behalf of the defendant.

Defendant rests.

Both sides rest.

It Is Ordered that this case be submitted on briefs and by the Court taken under advisement; that the plaintiffs be allowed ten days within which to file an opening brief; that the defendant be allowed ten days thereafter within which to answer and that the plaintiffs be allowed five days thereafter within which to reply.

In the United States District Court for the
District of Arizona, Phoenix Division
October, 1946 Term at Phoenix

Honorable Dave W. Ling,
United States District Judge, Presiding

[Title of Cause.]

Minute Entry of Monday, Feb. 24, 1947

**ORDER THAT PLAINTIFFS HAVE
JUDGMENT**

This case having been submitted and by the Court taken under advisement,

It Is Ordered that plaintiffs have judgment. [27]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Findings of Fact

The above entitled cause came regularly on for trial on the 14th day of January, 1947, before the court sitting without a jury, the Honorable Dave W. Ling, Judge presiding.

The plaintiffs appeared with their attorneys, Jerman & Flynn, James E. Flynn appearing. The defendant appeared by his attorneys, Charles B. McAlister and Frank E. Flynn, Charles B. McAlister appearing. Both sides having announced ready, the court proceeded to try the issues in the cause.

Whereupon the plaintiffs introduced evidence, both oral and documentary, in support of the allegations contained in the plaintiff's complaint and rested. Thereafter the defendant introduced evidence, both oral and documentary, in support of the allegations contained in his answer and rested.

Both sides having rested, the court entered an order [28] taking the matter under advisement, and granted the respective parties leave to file briefs in support of their respective positions with regard to the issues in the cause. All briefs having been filed and the matter having been under advisement, now, after due deliberation, the court finds:

I.

The allegations contained in paragraphs I, II and III of the plaintiffs' complaint are true in substance and in fact.

II.

Fifth Cause of Action

That prior to the 11th day of October, 1945, the Chinese Chamber of Commerce, a corporation, acting through its agents and servants, had delivered to Ung Too Thet, alias Ung Kok Si, as Treasurer of said corporation, at his place of business, 113 East Madison Street, Phoenix, Arizona, the sum of Eight Hundred Thirty-eight and 40/100 (\$838.40) Dollars to be held for and on behalf of said corporation; that the aforesaid money, and the whole thereof, was the property of said corporation, and the said Ung Too Thet, alias Ung Kok Si, was holding the aforesaid fund for and on behalf of said corporation as treasurer.

III.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the Eight Hundred Thirty-eight and 40/100 (\$838.40) Dollars, heretofore delivered to the said Ung Too Thet, as treasurer of the Chinese Chamber

of Commerce, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid Eight Hundred Thirty-eight [29] and 40/100 (\$838.40) Dollars was seized by the arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safe keeping thereof, was not the owner thereof nor of any part thereof, and was holding the same for and on behalf of the Chinese Chamber of Commerce as treasurer thereof.

IV.

That the said fund, and the whole thereof, is in the possession of the defendant, and the said defendant has refused to deliver said fund, or any part thereof, to the plaintiff Chinese Chamber of Commerce.

V.

Fourth Cause of Action

That prior to the 11th day of October, 1945, the Sun Kwung Tong Company, an association, acting through its agents and servants, had delivered to Ung Too Thet, alias Ung Kok Si, as treasurer of said association, at this place of business, 113 East Madison Street, Phoenix, Arizona, the sum of One Thousand Five Hundred (\$1,500.00) Dollars to be held for and on behalf of said association; that the aforesaid money, and the whole thereof, was the property of said association, and the said Ung Too Thet, alias Ung Kok Si, as said treasurer, in holding the aforesaid fund, was acting as treasurer for and on behalf of said association.

VI.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the One Thousand Five Hundred (\$1,500.00) Dollars, heretofore [30] delivered to the said Ung Too Thet, as treasurer of the Sun Kwung Tong Company, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid One Thousand Five Hundred (\$1,500.00) Dollars was seized by the arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safe keeping thereof, was not the owner thereof nor of any part thereof, and was holding the same for and on behalf of the Sun Kwung Tong Company as treasurer.

VII.

That the said fund, and the whole thereof, is in the possession of the defendant, and the said defendant has refused to deliver said fund, or any part thereof, to the plaintiff, Sun Kwung Tong Company.

VIII.

Second Cause of Action

That prior to the 11th day of October, 1945, the Wing Mae School in China, an association, acting

through its chairman, Frank Ong, delivered to Ung Too Thet, as treasurer of said association, at his place of business, 113 East Madison Street, Phoenix, Arizona, the sum of One Thousand Nine Hundred Fourteen (\$1,914) Dollars. That said sum was the property of said association and was delivered to the said Ung Too Thet, alias Ung Kok Si, as treasurer thereof, for safe keeping, and to be held by the said Ung Too Thet as treasurer of said association.

IX.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the One Thousand Nine Hundred Fourteen (\$1,914.00) Dollars, heretofore delivered to said Ung Too Thet, as treasurer of the Wing Mae School in China, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid One Thousand Nine Hundred Fourteen (\$1,914.00) Dollars was seized by the arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safekeeping thereof, and was not the owner thereof nor of any part thereof, and was holding the same for and on behalf of the Wing Mae School in China as treasurer thereof.

X.

That the said fund, and the whole thereof, is in the possession of the defendant, and the said defendant has refused to deliver said fund, or any part thereof, to the plaintiff, Wing Mae School in China.

XI.

Third Cause of Action

That the Chinese School of Phoenix, Arizona, acting through its chairman, Yeun Lung, delivered to the said Ung Too Thet, alias Ung Kok Si, as treasurer of said association, at his place of business, 113 East Madison Street, Phoenix, Arizona, the sum of One Thousand Five Hundred (\$1,500.00) Dollars to be held by the said Ung Too Thet, alias Ung Kok Si, as said treasurer.

XII.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison [32] Street, Phoenix, Arizona. That during the said arrest, the One Thousand Five Hundred Dollars (\$1,500.00), heretofore delivered to the said Ung Too Thet, as treasurer of the Chinese School of Phoenix, Arizona, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the

aforesaid One Thousand Five Hundred (\$1,500.00) Dollars was seized by the arresting agents, the said Ung Too 'Thet, alias Ung Kok Si, had no interest therein other than the safe keeping thereof, was not the owner thereof nor of any part thereof, and was holding the same for and on behalf of the Chinese School of Phoenix, Arizona, as treasurer.

XIII.

That the said fund, and the whole thereof, is in the possession of the defendant, and the said defendant has refused to deliver said fund, or any part thereof, to the plaintiff, Chinese School of Phoenix, Arizona.

XIV.

First Cause of Action

That for a long time prior to the matters herein complained of, the Chinese War Relief Association had been engaged in the solicitation of funds from organizations and individuals. That the said solicitation was conducted for the purpose of securing funds to be used for the benefit of the homeless and destitute residents of the Republic of China. That in the solicitation of said funds various parades, dances and entertaining features of different types had been staged and conducted. That as a result of the aforesaid activities on behalf of said association, the sum of Eleven Thousand Seven Hundred One and $41/100$ (\$11,701.41) Dollars had been collected. That on or before October 11, 1945, the said sum, [33] and the whole thereof, was delivered

to Ung Too Thet, alias Ung Kok Si, as treasurer of said association, at his place of business, 113 East Madison Street, Phoenix, Arizona.

XV.

That on or about the 11th day of October, 1945, the said Ung Too Thet, alias Ung Kok Si, was arrested by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act at 113 East Madison Street, Phoenix, Arizona. That during the said arrest, the Eleven Thousand Seven Hundred One and 41/100 (\$11,701.41) Dollars, heretofore delivered to the said Ung Too Thet, as treasurer of the Chinese War Relief Association, was seized by the arresting officers and taken from the possession of the said Ung Too Thet, alias Ung Kok Si. That at the time the aforesaid Eleven Thousand Seven Hundred One and 41/100 (\$11,701.41) Dollars was seized by the arresting agents, the said Ung Too Thet, alias Ung Kok Si, had no interest therein other than the safe keeping thereof, was not the owner thereof nor any part thereof, and was holding the same for and on behalf of the Chinese War Relief Association as treasurer thereof.

XVI.

That the said fund, and the whole thereof, is in the possession of the defendant, and the said defendant has refused to deliver said fund, or any part thereof, to the plaintiff, Chinese War Relief Association.

Conclusions of Law

The court, therefore, concludes as a matter of law: [34]

I.

That the plaintiff, Henry Ong, as President of Sun Kwung Tong Company, an association, is entitled to judgment against the defendant in the sum of One Thousand Five Hundred (\$1,500.00) Dollars.

II.

That the plaintiff, Chinese Chamber of Commerce of Phoenix, a corporation, is entitled to judgment against the defendant in the sum of Eight Hundred Thirty-eight and 40/100 (\$838.40) Dollars.

III.

That the plaintiff, Frank Ong, as chairman of the Wing Mae School in China, an association, is entitled to judgment against the defendant in the sum of One Thousand Nine Hundred Fourteen (\$1,914.00) Dollars.

IV.

That the plaintiff, Yeun Lung, chairman of the Chinese School of Phoenix, Arizona, an association, is entitled to judgment against the defendant in the sum of One Thousand Five Hundred (\$1,500.00) Dollars.

V.

That the plaintiff Fred Wong, chairman of the Chinese War Relief Association, an association, is entitled to judgment against the defendant in the sum of Eleven Thousand Seven Hundred One and 41/100 (\$11,701.41) Dollars.

VI.

That judgment be entered herein in conformity herewith.

Done in Open Court this 17th day of March, 1947.

DAVE W. LING,

Judge of the District Court.

[Endorsed]: Filed Feb. 28, 1947. [35]

In the United States District Court for the
District of Arizona, Phoenix Division

The following proceedings were had before the Honorable Dave W. Ling, United States District Judge, in Chambers at Portland, Oregon, on Monday, March 17, 1947:

Minute Entry of Friday, March 21, 1947

APPROVED PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW AND
JUDGMENT

[Title of Cause.]

It Is Ordered that Plaintiffs' Proposed Findings of Fact and Conclusions of Law be approved and adopted as the Findings of Fact and Conclusions

of Law herein and that the Plaintiffs' Proposed Judgment be filed, entered and spread upon the minutes as the judgment in this case as follows:

Civ. 804

HENRY ONG, President of Sun Kwung Tong Company, an association; CHINESE CHAMBER OF COMMERCE OF PHOENIX, a corporation; FRANK ONG, as Chairman of the Wing Mae School in China, an association; YEUN LUNG, Chairman of the Chinese School of Phoenix, Arizona, an association; and FRED WONG, Chairman of the Chinese War Relief Association, an association,
Plaintiffs,

vs.

WILLIAM P. STUART, United States Collector of Internal Revenue in and for the State of Arizona,
Defendant.

JUDGMENT

The above entitled cause came regularly on for trial on the 14th day of January, 1947, before the court sitting without a jury, the Honorable Dave W. Ling, Judge, presiding.

The plaintiffs appeared with their attorneys, Jerman & Flynn, James E. Flynn, appearing. The defendant appeared by his attorneys, Charles B. McAlister and Frank E. Flynn, Charles B. McAlister, appearing. Both sides announce ready; the court proceeded to try the issues in the matter.

At the conclusion of the said trial, the cause was taken under advisement. Thereafter appropriate findings of fact and conclusions of law were duly settled and filed herein.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, Henry Ong, as President of Sun Kwung Tong Company, an association, do have and recover judgment of and from the defendant in the sum of One Thousand Five Hundred (\$1,500.00) Dollars.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, Chinese Chamber of Commerce of Phoenix, Arizona, a corporation, do have and recover judgment of and from the defendant in the sum of Eight Hundred Thirty-eight and 40/100 (\$838.40) Dollars.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, Frank Ong, as chairman of the Wing Mae School in China, an association, do have and recover judgment of and from the defendant in the sum of One Thousand Nine Hundred Fourteen (\$1,914.00) Dollars.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, Yeun Lung, Chairman of the Chinese School of Phoenix, Arizona, an association, do have and recover judgment of and from the defendant in the sum of One Thousand Five Hundred Dollars (\$1,500.00).

It Is Further Ordered, Adjudged and Decreed that the plaintiff, Fred Wong, Chairman of the Chinese War Relief Association, an association, do have and recover judgment of and from the de-

defendant in the sum of Eleven Thousand Seven Hundred One and 41/100 (\$11,701.41) Dollars.

Done in Open Court this 17th day of March, 1947.

DAVE W. LING,

Judge of the District Court.

Approved as to form only:

FRANK E. FLYNN,

United States Attorney,

District of Arizona.

CHARLES B. McALISTER,

Assistant United States

Attorney,

Attorneys for Defendant.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the defendant and moves this Court that the judgment heretofore made and entered herein be vacated and set aside, and that a new trial be granted the defendant upon the following grounds, to-wit:

I.

That the judgment is not supported nor justified by the evidence.

II.

That the judgment is contrary to law.

III.

That the Court erred in making its finding that the money in the possession of the defendant was the property of the plaintiffs herein.

IV.

That the Court erred in concluding that the plaintiffs, particularly the plaintiff Henry Ong, as president of the Sun Kwong Tong Company and the plaintiff Chinese Chamber of Commerce, a corporation, were entitled to the sums awarded them, or to any sums whatsoever.

Respectfully submitted,
 FRANK E. FLYNN,
 United States Attorney,
 /s/ CHARLES B. McALISTER,
 Assistant U. S. Attorney,
 Attorneys for Defendant.

In the District Court of the United States
 for the District of Arizona
 Nos. Civ. 804 and 918 Phx.

HENRY ONG, et al., and
 GEE SOOT HONG, et al.,
 Plaintiffs,
 vs.
 WILLIAM P. STUART, etc.,
 Defendant.

MEMORANDUM IN SUPPORT OF
 MOTION FOR NEW TRIAL

In order to sustain its finding for the plaintiffs, the court must necessarily have determined that the money in the possession of the defendant was the subject of a trust either specific or constructive. The only evidence in support of this theory was

the testimony of Ong Kok Si, who, in a deposition, stated on direct examination that all the funds were put in trust with him by the parties-plaintiff and that he had kept the same funds in his safe ever since they were delivered to him; but who stated on cross-examination that he kept a lot of cash on hand so that he could cash checks for various people, acting as a banker, and that he did not segregate his money from the money of the various plaintiffs.

In addition there was undisputed testimony that more than \$3,000 in marked bills appeared throughout the bundles of money which were seized by the Customs Agents at the time of Ong Kok Si's arrest, this money having previously been used by the Customs Agents to make purchases of opium from Kok Si and his agents.

Insofar as the claim of the Sun Kwong Tong Co. is concerned, there was testimony by Henry Ong, its president, that the original \$1900 paid into the company by the various partners had been used to buy a stock of goods early in the history of the company, and that the money and stock had been turned over many times. There was further testimony that for a period of more than 15 years Ong Kok Si had [39] conducted the business as he saw fit without making any accounting to the alleged partners or without any complaints having been made by them.

As to the funds claimed to belong to the Chinese Chamber of Commerce, Kok Si testified that the money had been turned over to him a long time ago and he did not know the exact amount, but it

was whatever the books showed. The books which were introduced in evidence showed that the last entry had been made in 1939 and the amount it showed there to the credit of the Chinese Chamber of Commerce was the amount claimed by plaintiffs, although there was direct evidence that a bank account in a larger amount had been opened by the Chamber of Commerce subsequent to that time.

The burden of proof rested on the plaintiffs, and since the action is equitable in nature, seeking to impress a trust on funds in the hands of a third party, this required clear and convincing evidence, not a mere preponderance.

Since the only evidence pointing to a trust insofar as these monies were concerned was that of Kok Si, and that somewhat contradictory, it seems to defendant that plaintiffs have failed to sustain the burden. While the evidence of Kok Si, an admitted felon, was admissible, it certainly is not entitled to much weight, particularly since he had a definite interest in shifting his indebtedness to the plaintiffs, from his shoulders to the government's.

Respectfully submitted,

FRANK E. FLYNN,

United States Attorney.

/s/ CHARLES B. McALISTER,

Assistant U. S. Attorney,

Attorneys for Defendant.

Received copy this 31st day of March, 1947.

JERMAN & FLYNN,

Attorney for Plaintiffs, ad.

[Endorsed]: Filed March 31, 1947. [40]

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

This Court having entered its judgment on or about the 21st day of March, 1947, ordering the defendant William P. Stuart, United States Collector of Internal Revenue of the District of Arizona, to pay to the plaintiffs above named the sum of \$17,453.81, which sum had been seized by the said defendant as the property of one Ung Too Thet, alias Ong Kok Si, under an assessment and levy for unpaid taxes; and the Court having determined that the said sum of money belonged to the plaintiffs herein rather than to Ung Too Thet, alias Ong Kok Si; and it appearing that said seizure was made under the direction of the Commissioner of Internal Revenue and with probable cause, and it further appearing that the said defendant may be personally liable for the payment of said judgment, the Court finds:

That the defendant, William P. Stuart, as United States Collector of Internal Revenue for the District of Arizona, acted under the direction of the Commissioner of Internal Revenue and upon probable cause in the collection of said taxes and that a certificate of probable cause should therefore be granted. [41]

It Is Therefore Ordered that a certificate of probable cause be, and the same is hereby issued and entered in the above entitled cause and that the said William P. Stuart, Collector of Internal Revenue for the District of Arizona is hereby ordered

released from payment of said judgment, and said judgment is ordered paid out of the proper appropriation from the United States Treasury.

Done in Open Court this 8th day of May, 1947.

DAVE W. LING,
Judge.

[Endorsed]: Filed May 8, 1947. [42]

In the United States District Court for the
District of Arizona, Phoenix Division

April 1947 Term at Phoenix

Honorable Dave W. Ling,
District Judge, Presiding

[Title of Cause.]

Minute Entry of Friday, May 23, 1947,

ON MOTION FOR NEW TRIAL

Defendant's motion for new trial having been heretofore submitted,

It Is Ordered that said motion be and it is granted as to the fourth cause of action and denied as to all remaining causes of action. [43]

[Title of District Court and Cause.]

MOTION TO DISMISS FOR LACK OF JURISDICTION

Comes Now the defendant and moves this Court for an order vacating and setting aside the judgment heretofore entered in this matter and dismissing the complaint on file herein, on the ground that the Court has no jurisdiction of the subject matter of this litigation for the reasons and because of the facts hereinafter set forth.

1. An action against the Collector of Internal Revenue for the refund of an illegally, improperly or wrongfully collected tax must be filed in accordance with the provisions of paragraphs 3770 and 3772 of Title 26, U.S.C., which provide for the filing of a claim for refund with the Commissioner of Internal Revenue, to be followed by a waiting period of six months, before suit is filed, unless this procedure is followed no jurisdiction can be conferred on the District Court.

2. According to the affidavit hereto attached and made a part of this motion, the Collector received the monies in question from Federal Narcotic Agents and paid them into the U. S. Treasury, crediting the amount against the outstanding tax assessments of one Ong Kok Si, alias Ung Too Thet, several months before this suit was commenced. It further appears that no claim for refund was ever filed by the plaintiffs, or any of them, with the United States Commissioner of Internal Revenue. [44]

3. The District Court would have no jurisdiction of the action against the Collector on any other basis, as there is no diversity of citizenship, and since this is not a case arising under the laws of the United States (other paragraphs 3770-3772) within the meaning of Par. 41(1)(5)(20) of Title 28 U.S.C.

Respectfully submitted,

FRANK E. FLYNN,

United States Attorney,

/s/ CHARLES B. McALISTER,

Assistant U. S. Attorney.

[Title of District Court and Cause.]

AFFIDAVIT

State of Arizona,

County of Maricopa—ss.

William P. Stuart, being first duly sworn, upon oath deposes and says:

That he is the legally appointed and acting Collector of Internal Revenue for the District of Arizona and has been such ever since the 1st day of March, 1937, or thereabouts; that as such Collector he received from Narcotic Agents of the United States the sum of \$20,915.02 on or about the 23rd day of October, 1945, which the said Narcotic Agents reported had been seized from one Ong Kok Si, alias Ung Too Thet at the time of his arrest for violation of the United States Narcotic laws; that

a delinquent assessment had theretofore been made against the said taxpayer for unpaid 1943 and 1944 income taxes in the total amount, including interest and penalties of \$25,893.11; that on or about the 30th day of October, 1945, the said sum of \$20,-915.02 was covered into a Treasury Account and applied against the unpaid income taxes of the said Ong Kok Si; that ever since the said 30th day of October, 1945, the said sum of money has been in the legal possession of the Treasury of the United States of America and not in the possession or control of your affiant.

That while a demand was made by the plaintiffs herein through their attorneys on the Collector for the return of the said monies, [46] which it was claimed had been illegally seized, no claim for refund against the United States has ever been filed with affiant or with the Commissioner of Internal Revenue in accordance with the requirements of Sections 3770 and 3772 of Title 28, U. S. Code.

WILLIAM P. STUART.

Subscribed and sworn to before me, a Notary Public, this 23rd day of May, 1947.

HELEN B. HAWORTH,
Notary Public.

My commission expires April 24, 1949.

Copy received this 26th day of May, 1947.

JERMAN & FLYNN,

Attorneys for Plaintiffs, ad.

[Endorsed]: Filed May 26, 1947. [47]

In the United States District Court for the
District of Arizona, Phoenix Division

April 1947 Term at Phoenix

Honorable Dave W. Ling,
United States District Judge, Presiding

[Title of Cause.]

Minute Entry of Monday, May 26, 1947, Amending
Findings of Fact; Denying Motion for Lack of
Jurisdiction

No appearance is made on behalf of the plaintiffs. Charles B. McAlister, Esquire, Assistant United States Attorney, appears for the defendant and now states that respective counsel have stipulated that the numbers of the causes of action as shown on the Findings of Fact herein may be amended to conform to the causes of action as set out in the complaint and it is ordered that the Clerk amend said Findings of Fact accordingly, by interlineation,

It Is Further Ordered that the Defendant's Motion to Dismiss for Lack of Jurisdiction, filed herein this date, be and it is denied.

Counsel for the defendant now states that counsel for the plaintiffs has requested that the Fourth Cause of Action of the Complaint herein be dismissed without prejudice, and

It Is Ordered that said Fourth Cause of Action be and it is dismissed with prejudice. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that William P. Stuart, United States Collector of Internal Revenue in and for the State of Arizona, defendant in the above entitled and numbered cause, appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the trial court made and entered on the 23rd day of May, 1947, wherein defendant's motion for a new trial was denied as to the first, second, third and fifth causes of action; and from the final judgment of the District Court wherein plaintiffs were awarded the sum of \$15,-953.81, and from the order of the District Court made and entered on the 26th day of May, 1947, wherein defendant's motion to dismiss for lack of jurisdiction was denied.

FRANK E. FLYNN,

United States Attorney,

/s/ CHARLES B. McALISTER,

Assistant U. S. Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 7, 1947. [49]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant designates the following portions of the record in the above entitled and numbered cause to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as the record of appeal in the above entitled cause:

1. Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.
4. Original judgment.
5. Defendant's Motion for a New Trial.
6. Defendant's Motion to Dismiss for Lack of Jurisdiction.
7. Affidavit of Defendant in Support of Motion to Dismiss for Lack of Jurisdiction.
8. Certificate of Probable Cause.
9. Reporter's Transcript.
10. Plaintiffs' Exhibit "B" (Deposition of Ong Kok Si).
11. All Minute (Docket) Entries.
12. Notice of Appeal.
13. This Designation.

FRANK E. FLYNN,
United States Attorney,
/s/ CHARLES B. McALISTER,
Assistant U. S. Attorney,
Attorneys for Defendant.

Copy received this 7th day of August, 1947.

JERMAN & FLYNN,
By JAMES E. FLYNN,
Attorneys for Plaintiffs, ad.

[Endorsed]: Filed Aug. 7, 1947. [50]

[Title of District Court and Cause.]

ORDER

It Is Ordered that the clerk of this court transmit to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal herein, the original of Plaintiff's exhibit "B", to-wit: the Deposition of Ong Kok Si, pursuant to Rule 75(i) of the Federal Rules of Civil Procedure, together with the duplicate of the reporter's transcript as provided in Rule 75(b).

Dated this 25th day of August, 1947.

DAVE W. LING,
United States District Judge.

[Endorsed]: Filed Aug. 26, 1947. [51]



[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
ON BY DEFENDANT ON APPEAL

The defendant having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment order made and entered herein on May 23, 1947, by the District Court of the United States for the District of Arizona and from the order of the District Court made and entered on May 26, 1947, denying defendant's motion to dismiss for lack of jurisdiction, hereby

designates the following points to be relied on in the prosecution of said appeal:

The District Court erred:

I.

In concluding that plaintiffs were entitled to recover from the defendant the aggregate sum of \$15,953.81, representing a portion of the amount seized by the defendant as the property of one Ung Too That, alias Ong Kok Si, to satisfy an assessment and levy for unpaid taxes.

II.

In failing to conclude that the defendant was entitled to judgment dismissing the complaint filed herein.

III.

In finding that the defendant had in his possession the above referred to sum of \$15,953.81, which was ordered to be paid to plaintiffs herein. [52]

IV.

In failing to make a finding that the defendant did not have in his possession the above referred to sum of \$15,953.81.

V.

In denying the defendant's motion to vacate and set aside the judgment entered herein.

VI.

In denying the defendant's motion to dismiss for lack of jurisdiction, for the reason that the District

Court was without jurisdiction of the subject matter of the complaint filed herein, since plaintiffs had not filed claims for refund as required by Section 3772 of the Internal Revenue Code.

VII.

In denying the defendant's motion to dismiss for lack of jurisdiction, for the reason that the District Court was without jurisdiction over this defendant or over the fund which was ordered to be paid by him to plaintiffs, since said fund, representing a portion of the amount seized from the taxpayer as aforementioned, was not in the possession of or under the control of the defendant, said fund having been covered into the Treasury of the United States prior to the institution of this proceeding, pursuant to the provisions of Section 3971 of the Internal Revenue Code.

Dated this 26th day of August, 1947.

FRANK E. FLYNN,

United States Attorney,

Attorney for Defendant.

By E. R. THURMAN,

Assistant U. S. Attorney..

Received copy of the within Statement of Points to Be Relied on by Defendant on Appeal, this 26th day of August, 1947.

JERMAN & FLYNN,

By JAMES E. FLYNN,

Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 26, 1947. [53]

In the United States District Court for the
District of Arizona, Phoenix Division

April 1947 Term at Phoenix

Honorable Dave W. Ling,
United States District Judge, presiding

[Title of Cause.]

Minute Entry of Wednesday, Sept. 19¹⁰, 1947.

EXTENDING TIME TO FILE RECORD
AND DOCKET ACTION

It Is Ordered that the appellant's time for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the Ninth Circuit be and it is extended to and including November 5, 1947. [54]

In the United States District Court
for the District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Henry Ong, President of Sun Kwung Tong Company, an association, et al., Plaintiffs, vs. William P. Stuart, United States Collector of Internal Rev-

enue, Defendant, numbered Civil 804 Phoenix, on the docket of said Court.

I further certify that the attached pages numbered 1 to 54, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Designation filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the duplicate of the Reporter's Transcript, and the original of Plaintiffs' exhibit B are transmitted herewith pursuant to order of the Court, and made a part of this record on appeal.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$22.00 and that a memorandum of said sum has been entered in said cause by me for services rendered on behalf of the United States.

Witness my hand and the seal of said Court this 24th day of October, 1947.

[Seal] /s/ WM. H. LOVELESS,
Clerk. [55]

In the District Court of the United States
for the District of Arizona
No. Civ. 804 Phx.

HENRY ONG, et al.,

Plaintiffs,

vs.

WILLIAM P. STUART, United States Collector
of Internal Revenue in and for the State of
Arizona,

Defendant.

No. Civ. 918 Phx.

GEE SOOT HONG, YEE WO & COMPANY,
TOM NOM and FONG W. YUEY,

Plaintiffs,

vs.

WILLIAM P. STUART, United States Collector
of Internal Revenue in and for the State of
Arizona,

Defendant.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiffs: Mr. James E. Flynn.

For the Defendant: Mr. Charles B. McAlister,
Assistant United States Attorney.

Phoenix, Arizona, January 14-15, 1947

The above entitled and numbered causes came on
duly and regularly to be heard in the above entitled

court before Hon. Dave W. Ling, Judge, presiding without a jury, commencing at the hour of 1:00 p.m., on the 14th day of January, 1947.

The plaintiffs were represented by their attorney Mr. James E. Flynn, of Messrs. Jerman & Flynn, attorneys at law.

The defendant was represented by Mr. Charles B. McAlister, Assistant United States Attorney.

The following proceedings were had:

The Clerk: Civil 804, Phoenix, Henry Ong, et al., plaintiffs, versus William P. Stuart, United States Collector of Internal Revenue in and for the State of Arizona, defendant, and Civil 918, Phoenix, Gee Soot Hong, Yee Wo & Company, Tom Nom and Fong W. Yuey, plaintiffs, versus William P. Stuart, United States Collector of Internal Revenue in and for the State of Arizona, defendant, for trial.

Mr. Flynn: The plaintiffs are ready.

Mr. McAlister: The Government is ready.

The Court: All right. Now, what witnesses did you want to put on, put them on out of order?

Mr. Flynn: I'd like to put on Gee Soot Hong and Henry Ong, if the Court please.

The Court: All right.

Mr. Flynn: I think, if the Court will permit me, I'd like to have the Interpreter sworn and examine this witness through an Interpreter. He understands some English, but I am afraid he might get confused. I have Walter Ong, if it is agreeable to the Government.

Mr. McAlister: It is agreeable with me personally, but the only objection I can see is that Walter signed [2*] the complaint as agent for the plaintiffs in one of the cases, and I don't know whether I could conscientiously allow him to act as Interpreter. My personal opinion is it would be perfectly all right.

Mr. Flynn: So far as that is concerned, if the Court pleases, that was one of the reasons we used Mr. Ong to make the affidavits for and on behalf of the plaintiffs in this action, because he interpreted it to them and probably they didn't understand all of the phraseology, and so forth, in it, and consequently, we used Mr. Ong to sign the affidavits for and on behalf of the plaintiffs. As a matter of fact, I doubt seriously whether the affidavit was necessary on the complaints under the present rules of procedure in court, but we used it as a matter of precaution to put the affidavits on there.

The Court: Oh, I think I will permit him to be sworn.

Mr. Flynn: Very well, be sworn.

(Walter Ong was duly sworn to act as Interpreter.)

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

GEE SOOT HONG

a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Flynn:

Q. Will you state your name, please? [3]

A. Gee Soot Hong.

Q. Where do you live, Mr. Hong?

A. 850 Grand Avenue.

Q. Grand Avenue where?

A. San Francisco.

Q. 850 Grand Avenue, San Francisco, California? A. Yes.

Q. What business are you in there in San Francisco, Mr. Hong?

A. Chinese import and export business.

Q. Were you acquainted with Kok Si, alias Ung Kok Si, Ung Too Thet, here in Phoenix?

A. Yes.

Q. How long have you known him?

A. About one year.

Q. Were you interested in 1945—prior to the 11th or 7th day of August, were you interested in the purchase of some real property located in Phoenix, Arizona? A. Yes.

Q. And what did that real property consist of, if you know?

A. It is a piece of property on Second Street and Jefferson, across the alley from the Golden Dragon Cafe there. It is a lot 75 feet wide and 125 feet long.

(Testimony of Gee Soot Hong.)

Q. Ask him whether he knows whether or not that would be Lots 1, 2 and 3 in Block 34, in the City of [4] Phoenix? A. Yes.

Q. Did you send some money to Kok Si for the purchase of that property? A. Yes.

Q. How much money did you send?

A. \$2,500.

Q. How did you send that money?

A. I purchased a Cashier's check from the Bank of Canton in San Francisco and sent it on to him.

Q. Do you recall the date, or the approximate date, that you sent the money to Kok Si?

A. It was around August, 1945. I don't know the exact date.

Q. That \$2500 Cashier's check was sent to Kok Si for the purchase of this property that you have described, is that correct? A. Yes.

Q. Do you know what happened to that Cashier's check?

A. I know that it was taken by some officers.

Q. Do you know where that Cashier's check is now? A. The officers took it.

Q. Do you know what officers took the check?

A. No.

Q. Were the proceeds of the check used for the purchase of the property as you had intended?

A. No.

Mr. Flynn: At this time, if the Court please, I'd like to ask counsel for the Government to produce the check drawn on the Bank of Canton at

(Testimony of Gee Soot Hong.)

San Francisco, being No. 13459, in the sum of \$2500, payable to the order of Ung Kok Si.

Mr. McAlister: We have no objection.

Mr. Flynn: I understand the Government has no objection, and for the purpose of keeping the record straight, I'd like to offer this as Plaintiffs' Exhibit A in evidence.

(Thereupon the document was marked as Plaintiffs' Exhibit A in evidence.)

Mr. Flynn: Your Honor please, this testimony is being presented here a little out of order, but it is admitted in the pleadings that the check was seized by the agents as alleged there on the 11th day of October, by the narcotic agents who made the arrest of Kok Si, and they admit the possession of the check. I hand you Plaintiffs' Exhibit A in evidence and ask you if you can tell me what that is, Mr. Hong.

A. This is the check I sent to Kok Si.

Q. As far as you know, that check has been in the hands of the Government agents since the 7th or the 11th of October, when it was seized by the arresting [6] officers, is that right? A. Yes.

Q. Did Kok Si, or Ung Kok Si, have any interest in this check? A. No.

Q. Did he have any interest in any part of the check? A. No.

Q. Your testimony is, then, that you sent this check to Kok Si to be used for the purchase of this property? A. Yes.

(Testimony of Gee Soot Hong.)

Q. After this check was seized by the Government agents did you inquire at the Bank of Canton in San Francisco about the check?

A. Yes, I went and inquired about it and they told me it was stopped payment.

Q. Stopped payment. Have you received from Kok Si or any other person any portion of this \$2500 check? A. No.

Q. And this is your money, is it, Mr. Hong, represented by Plaintiffs' Exhibit A in evidence?

A. Yes.

Mr. Flynn: That is all.

Cross-Examination

By Mr. McAlister:

Q. How long have you known Kok Si? [7]

A. About a year.

Q. Where did you first meet him?

A. Met him here in Phoenix.

Q. When you say about a year, you mean about a year back from the year, the time he was arrested? A. Yes.

Q. Which is that?

A. He meant that it was prior to the time Kok Si was arrested, about a year before that.

Q. Was that the first dealings you had with Kok Si? A. Yes.

Q. Now, you stated that yourself and one or two others were going to buy this property and you sent the money to Kok Si to purchase it? A. Yes.

Q. Who else was involved in the deal with you?

(Testimony of Gee Soot Hong.)

A. All I know is, there was one more, 'Thomas Nom.

Q. Did he send down some money too?

A. Yes.

Q. At the same time you did?

A. Same time.

Q. Now, do you remember exactly when that was sent?

A. I don't know exactly, but I think it was around August 7th or 8th, 1945.

Q. Who was buying this property that you had in mind? [8]

A. Outside of Thomas Nom from San Francisco, and myself, I don't know who else. There was some local people.

Q. You don't know whether Kok Si was interested in it or not? A. No, I don't.

Q. Did you have the property in mind before you sent the money down? A. Yes.

Q. Did you know how much it would cost approximately?

A. Approximately \$17,500, or \$18,000.

Q. That is, you knew that before you sent the money down? A. Yes.

Q. Now, who was going to use the property?

A. 30 feet by 75 feet of that property was going to be sold back to the Sue Ying Benevolent Association, and the balance of it was to be developed by the interested parties.

Q. That is, you and Tom Nom and the local parties were going to develop the rest of it in some local business or something? A. Yes.

(Testimony of Gee Soot Hong.)

Q. Kok Si was not a part of that group?

A. I don't know.

Q. You don't know, and you never sent any other money [9] to Kok Si? A. No.

Q. Did you belong to the same Benevolent Association? A. Yes.

Q. This property that you were buying for the Association, you had more property than the Association needed? A. Yes.

Q. Do you know whether or not that property was ever purchased—

Mr. Flynn: That is objected to, if the Court please. It would be immaterial to the issues in this case.

The Court: He may answer. Was the property ever purchased?

A. I understand that it is already purchased.

Q. (By Mr. McAlister): They didn't ask you to put up any more money for it? A. No.

Q. And Kok Si never paid you or offer to repay you the money that had been seized for the tax?

A. No.

Mr. McAlister: I think that is all.

Mr. Flynn: That is all.

(The witness was excused.)

Mr. Flynn: Your Honor please, this witness is from San Francisco, and I'd like to ask that he be excused [10] so he may return to San Francisco. Do you have any objection?

Mr. McAlister: No objection.

Mr. Flynn: Call Henry Ong.

HENRY ONG

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Flynn:

Q. Will you state your name, please?

A. Henry Ong.

Q. Where do you live, Mr. Ong?

A. 2005 East McDowell.

Mr. McAlister: I think this witness speaks English all right.

Mr. Flynn: Does he speak English?

The Interpreter: He says he understands a part and don't understand a part.

Q. (By Mr. Flynn): What business are you in, Mr. Ong?

A. Not doing anything now.

Q. How long have you lived in Phoenix?

A. Over 30 years—approximately 36 years.

Q. Are you the President of the Sun Kwung Tong Company? A. Yes.

Q. How long have you been acting as President of [11] that Company.

A. Ever since the Sun Kwung Tong Company was formed, up until now.

Q. When was it formed?

A. Approximately 1923 or '24.

Q. And you have been President since the date it was formed?

A. Yes. It has never been changed.

(Testimony of Henry Ong.)

Q. Are you still the acting President?

A. Yes.

Q. Is that an association or a corporation, do you know? A. It is just an association.

Q. And what business is the association engaged in?

A. Buying and selling Chinese merchandise.

Q. Where is it located, the place of business?

A. 113 East Madison.

Q. Are you acquainted with Kok Si?

A. Yes.

Q. How long have you known him?

A. About three or four months before the Sun Kwung Tong Company was formed. I have known him since.

Q. In the year 1945, was Kok Si Treasurer of the Sun Kwung Tong Company? A. Yes.

Q. How long has he been Treasurer of that Company? [12]

A. He has been Treasurer ever since the Company was formed.

Q. Do you know of your own knowledge whether Kok Si had any money belonging to the Sun Kwung Tong Company in his possession on the night of October 11, 1945, when he was arrested by the Narcotic Agents?

A. All of the Sun Kwung Tong Company's money was in his possession.

Q. Do you know how much he was holding at that time for the Sun Kwung Tong Company?

A. Approximately \$1900.

(Testimony of Henry Ong.)

Q. When this Sun Kwung Tong Company was formed, will you tell us who put the money into the association and how much original capital they started with, if you know?

A. There was approximately \$1900.

Q. Where did that \$1900 come from when the Company was first organized?

A. It was a hundred dollars a share, and different Chinese parties bought shares of the Company, which amounted to \$1900.

Q. Was that \$1900, as far as you know, used as operating capital, or was that your original investment which was held in reserve?

A. This was always used to be kept in reserve.

Q. And that is the \$1900 that you referred to that Kok Si had in his possession on the night he was arrested? [13]

A. Yes.

Q. Do you know what happened to that \$1900, Henry?

A. The Government officers, I understand, went and took it.

Q. You weren't present when the arrest was made?

A. No, I was not present.

Q. It is your understanding that that money was seized by the Government?

A. I understand all of Kok Si's money was taken and that money was included in it.

Q. Have you ever received any of that \$1900 back?

A. No.

Q. As far as you know, the money is still in the possession of the Government, is that correct?

A. Yes.

(Testimony of Henry Ong.)

Q. Now, out of that \$1900, do you know, Henry, of your own knowledge, how much of that or how many shares of stock belonged to Kok Si as his own personal property? A. He had four shares.

Q. Were those hundred dollar shares, as far as you know, Henry? A. Yes.

Q. That would be \$400 of that \$1900 that belonged then to Kok Si personally? A. Yes.

Q. Do you know whether or not Kok Si kept books as [14] Treasurer of the Sun Kwung Tong Company?

A. In the beginning he did, used to keep good records, but after several years, then he was pretty neglectful in keeping them.

Q. Where is the place of business of the Sun Kwung Tong Company located?

A. 113 East Madison.

Q. And I believe you testified that the Company was engaged in merchandising of Chinese merchandise, is that correct? A. Yes.

Mr. Flynn: I believe that is all.

Cross-Examination

By Mr. McAlister:

Q. You said this Company was organized to import and sell Chinese merchandise?

A. Not import, just buying Chinese goods from San Francisco, Los Angeles, and sell it to local Chinese people.

Q. Was it a brokerage company; did they maintain a store here, or a warehouse?

A. No, it is just a small Chinese store.

(Testimony of Henry Ong.)

Q. And their regular place of business was on East Madison where Kok Si lived, is that correct?

A. Yes. [15]

Q. Was there any particular type of merchandise sold, issued, or something like that, or what?

A. Chinese eating goods.

Q. And you have been President ever since it was organized?

A. Yes, I was the originator. I was the one that asked everyone to put shares in the Company.

Q. Any other officers besides Kok Si?

A. No, it was a small business, there wasn't any more officers.

Q. Did you ever receive any dividends from the business? A. No.

Q. Never have since it started? A. No.

Q. How often did they hold meetings?

A. Three or four years after it was organized, we would have a yearly meeting every year, but after three or four years I went back to China, and ever since there has never been any meeting.

Q. How long were you back in China?

A. I stayed in China two years.

Q. There have been no meetings since that time?

A. Ever since 1928, I went back to China, there has never been any meetings.

Q. Did Kok Si make any reports to the partners on [16] the business? A. No.

Q. Did you go down to the business headquarters very often?

A. I visited the place in times when I needed Chinese merchandise.

(Testimony of Henry Ong.)

Q. How long since you have been in active business, Mr. Ong?

A. Approximately since October 10th, 1942, when my sons were called to the Service.

Q. You had a store of your own at that time?

A. Yes, I had a store previous to October, 1942.

Q. Now, you said this was not a corporation and an association, it was in the nature of a share partnership, is that right? A. Yes.

Q. And each of you put in a hundred dollars of the original investment? A. Yes.

Q. And you said that was not used in the operation of the business?

A. This original investment was to start the business.

Q. Was that used to buy the first stock of goods, or what?

A. He started his original order and after he sold [17] it, out of the profits they started purchasing more merchandise.

Q. You stated on direct examination that this money was taken by the Government agents at the time of the arrest of Kok Si. Do you know that, or did someone tell you that?

A. Everything in the safe—the Sun Kwung Company money and books were in the safe, so everything that was in the safe was taken, so we presume that the Government had taken the money.

Q. And you base your statement on the fact that everything in the safe was taken, and you think all of the Company's money was in the safe, is that right? A. Yes.

(Testimony of Henry Ong.)

Q. But you don't know that of your own knowledge; that is, you have not been down there and inspected the safe or the books for a long time?

A. Yes.

Q. Do you know whether or not the Company maintained a bank account?

A. From the beginning I helped him open an account, but ever since then, I don't know.

Q. He never told you whether they were keeping the account open or not?

A. No, he never told me.

Q. It is quite possible they might have had accounts [18] in two or three banks, is that true?

A. That I don't know.

Q. Where are the other partners in this Company at the present time?

A. Practically every one is still living here in Phoenix except one or two that passed away.

Q. They didn't join in the suit asking for their money back, is that correct?

A. Because I was the originator of this Company, everybody had been asking me, so I had to, in turn, ask the Government for the money.

Q. Do you recall telling one of the Narcotics Officers that Kok Si had frozen all the rest of you out of the Company?

Mr. Flynn: Just a minute. If the Court please, I take it this is impeachment, and I think the time and place should be fixed.

The Court: Yes, that is correct.

(Testimony of Henry Ong.)

Q. (By Mr. McAlister): Do you recall making that statement to Mr. Earl Smith?

A. I never said that we were frozen out because he had never give us the money back, how could he freeze us out?

Q. What did you tell him, do you recall?

A. Nothing, only that he asked me things in regard to Kok Si and the Sun Kwung Tong Company, and I answered [19] it.

Q. You told him you knew very little about it any more, is that right?

A. Because he had not made any reports, that is true, I told him.

Mr. McAlister: That is all.

Mr. Flynn: That is all.

(The witness was excused.)

Mr. Flynn: Likewise, if the Court please, I'd like to ask that this witness be excused.

The Court: Yes.

Mr. McAlister: We have one witness we would like to put on, your Honor. It will be considerably out of order, but he would like to go on down to Nogales on some work.

Mr. Flynn: May I state at this time, in consideration of the Court, that when the record is made up of this matter, that it be made up in continuity. [20]

10:00 o'Clock A.M., January 15, 1947

Pursuant to adjournment on January 14th, the trial, with all parties as noted in the Clerk's record being present, was continued as follows:

Mr. Flynn: Your Honor please, in Civil 918 and Civil 804, the two cases on file before the Court, at various times reference will be made to Kok Si, and I'd like the record to show at this time that Ong Kok Si, spelled O-n-g K-o-k S-i, and Ung Too Thet and Ung Kok Si, spelled U-n-g K-o-k S-i are one and the same person. Will you so stipulate?

Mr. McAlister: Yes. I think there is probably another alias, Mr. Flynn.

Mr. Flynn: Well, if there is, that is one and the same person.

Mr. McAlister: We will stipulate to that.

Mr. Flynn: At this time, if the Court please, I'd like to introduce into evidence the deposition of Kok Si that was taken pursuant to Rule 27 of the Rules of Civil Procedure, on the 25th day of February, 1946, pursuant to an order made on a petition presented in this Court with notice of taking deposition, and an order authorizing the taking of the deposition which appears of record in this case. [21]

(Thereupon the document was marked as Plaintiffs' Exhibit B in evidence.)

Mr. McAlister: For the purpose of the record at this time we have no objection to its introduction, but we would like to object to the statements in there, wherein Kok Si has stated that certain

moneys were given to him in trust. In fact, that is a conclusion on his part and entirely self-serving.

Mr. Flynn: I think, if the Court please, that we stipulated somewhere in the taking of the deposition that objections relative to the testimony will be saved until the trial by either Mr. McAlister and myself, that the making of objections at that time will be waived, and that we could make objections to each question and answer, and that the Court can rule on it at that time. I think that is the usual procedure, if I am not mistaken.

The Court: All right.

(Counsel then prepares to read the deposition into evidence.)

The Court: Why can't the Court read that and save this time? I will have to read it anyway.

Mr. McAlister: That is what I was wondering and that is why I made this blanket objection.

The Court: And the mere fact that you object would not save the Court from reading it. [22]

Mr. McAlister: No.

Mr. Flynn: It wouldn't take too long.

The Court: What advantage would there be? I will probably read it again.

Mr. Flynn: Very well. If the Court desires it that way, we will proceed.

The Court: Yes.

Mr. Flynn: That is Plaintiffs' Exhibit C in evidence?

The Clerk: Yes.

Mr. Flynn: With reference to the second cause of action in Civil 918, I think it can be stipulated at this time between counsel for the Government and counsel for the plaintiffs, that if Tom Nom, a plaintiff in that action, and suing on the second cause of action, were present, that he would testify as follows:

“The reason for his absence is that he is not physically able to be present.”

Prior to the trial I called Mr. Nom on the phone and advised him that it would be necessary for him to be here at the trial to testify, and also read him a letter. He advised me in a telephone conversation that he was suffering from a rather severe heart condition, and had been practically in an invalid state for the last six months, and he was apprehensive that if he made the trip to Phoenix to testify in this case, it would perhaps be rather disastrous as far as his health [23] is concerned. Consequently, I contacted Mr. McAlister, the attorney for the defendant, and I believe he will stipulate that if Mr. Nom were present this morning that he will testify as follows: “That on or about the 2nd day of August, 1945, he, the Tom Nom, sent a check in the sum of \$2500, payable to the order of the Sun Kwung Tong Company to Ong Too Thet, alias Ong Kok Si, as Treasurer of the Sun Kwung Tong Company, at his place of business at 113 East Madison Street, Phoenix, Arizona, that the check was No. 500, drawn on the Bank of Canton, San Francisco, California, and I believe dated

some time prior to August 2nd, 1945; that the proceeds of the check \$2500, and the whole thereof, were to be used by the said Kok Si, to be applied on the purchase price of Lots 1, 2, and 3, Block 34, in the City of Phoenix; that the said Kok Si had no interest in the check personally; that he was not the owner of any of the proceeds of the check, but was holding the same for the purpose of purchasing that property which I have described."

It is admitted in the pleadings that that will be what he will testify to, is that correct, Mr. McAlister?

Mr. McAlister: That is correct. We will stipulate he would so testify.

Mr. Flynn: May I have the check? At this time, if the Court please, we would like to introduce the check [24] that I have referred to, the \$2500 check dated August 2nd, 1945, payable to the order of the Sun Kwung Tong Company, and signed Tom Nom and Fong W. Yuey, the title "Yee Wo & Company," and drawn on the Bank of Canton, San Francisco, California, as Plaintiffs' C in evidence.

(Thereupon the document was marked as Plaintiffs' Exhibit C in evidence.)

Mr. Flynn: Fred Wong.

FRED WONG

was called as a witness on behalf of the plaintiffs and being first duly sworn, testified as follows:

Direct Examination

By Mr. Flynn:

Q. Do you understand English?

A. Yes, I know some of it.

Q. Would you prefer that these questions and answers be interpreted by Mr. Ong, or do you think you can understand them?

A. Well, I think maybe better Mr. Ong can interpret it.

Mr. McAlister: I think the witness can understand it all right.

The Court: Yes, we will see how well he understands it.

Q. (By Mr. Flynn): Will you state your name, please? [25] A. My name is Fred Wong.

Q. Where do you live, Mr. Wong?

A. 1716 West Van Buren.

Q. That is Phoenix, Arizona?

A. Phoenix, Arizona.

Q. How long have you lived here, Mr. Wong?

A. About four and one-half years.

Q. What business are you in at the present time? A. Grocery.

Q. Grocery business? A. Yes.

Q. Are you a member of the Chinese War Relief Association? A. Yes.

Q. Are you acquainted with the history of that organization?

(Testimony of Fred Wong.)

A. I am—you mean what I do there?

Q. When was that organization formed, Mr. Wong?

A. When it started to form it was about eight years ago. At that time I wasn't here.

Q. As far as you know, it was formed about eight years ago? A. Yes.

Q. Do you know what the purpose of that organization was, why it was formed?

A. Well, yes, for helping Chinese refugee and soldiers. [26]

Q. For the purpose of helping Chinese refugees and the Chinese Army, is that correct?

A. Army; anything in China they need, to call us to help, we just follow and do what we can for China.

Q. It was formed some time shortly after Japan and China went to war about eight years ago?

A. Yes, since Japan invaded China and they start that association.

Q. Now, the purpose of the organization was to secure funds to send to the destitute people in China, is that correct? A. Yes.

Q. Where did those funds come from?

A. Funds from all Chinese in town, I mean anywhere, people who want to help, around—the Chinese people in Phoenix and way around the little towns like Mesa, you know, all around; around here, the little towns included.

Q. In other words, this Association was composed of the Chinese people in Maricopa County and outlying districts?

(Testimony of Fred Wong.)

A. And we help, inside County, outside County. Any Chinese like to help, we strive to take money.

Q. Did they have officers in this association?

A. Yes.

Q. In 1945, were you the Chairman of the Association? A. '45 and '46, yes. [27]

Q. And did you have a Treasurer of the organization? A. Yes.

Q. In 1945, who was the Treasurer of the organization? A. Ung Kok Si.

Q. How long had you known him prior to 1945, Mr. Wong?

A. Well, since I came in, I know him, about four years.

Q. Now, during this period of eight years that this relief—Chinese Relief Association was in existence, how did you collect the money; what method did you use to get the money?

A. We collect the money what we call—you mean when we collect money?

Q. How did you collect it?

A. Well, we send some Chinese to each store. If we heard news, say, the war in China, and we won the war and we try to send men all around the stores and collect money to help those who went to war, and sometimes we get news from China say the Japs is burning down city, and a lot of literature, and we send the men to the stores, and send men and show literature, and some time we have—every year, 7th of July, that day was Japanese start invade China, the first day, and then we always use that day to collect money.

(Testimony of Fred Wong.)

Q. Did you have different celebrations that you celebrated, like the double ten and double seven for the [28] purpose of securing money for the Chinese War Relief Association?

A. Yes, every year, 10th of October, that is China Independence Day, we always collect the money and spend for the celebration for the Independence Day, and this same money, we save a part of that money and send back to China to help the soldier or the Army, the soldier, wounded soldier who got hurt.

Q. Did you also have a celebration known as the Double Seven?

A. We don't have celebration, but we always have to take money, collect.

Q. Did you also have a Victory Parade?

A. Yes, we had the biggest one, we had in what is that, last year, the one right after the war.

Q. Well, I am talking about 1945, before that.

A. You mean, celebration for what, for the VJ Day?

Q. No. Did you have a celebration known as the Victory Parade for the purpose of securing funds for the Chinese Relief Association prior to 1945?

A. Well, will you tell me what that is, I don't understand that?

Mr. Flynn: Well, then, just strike the question.

Q. Did you also have jars or cans marked "Chinese Relief Association" which you put around the different Chinese stores so that people could contribute? [29]

A. Yes, we do.

(Testimony of Fred Wong.)

Q. And this Association, you said, had been in continuous operation since 1940—1938, 1939, since when? A. I didn't get you.

Q. When did this Chinese Relief Association start?

A. I don't know what year because at that time I wasn't in Phoenix.

Q. It was in operation during the four years you were here? A. Yes, yes.

Q. When that money was collected from these different sources that you have testified to here, what would you do with the money; did you give it to somebody?

A. When we collect the money and we get it to the treasury to keep first, all money turned to the Treasurer.

Q. And in 1943, who was the Treasurer?

A. 1943, 1944, '45—'43—Kok Si, Treasurer.

Q. In 1944, was he Treasurer? A. Yes.

Q. And 1945? A. Yes.

Q. 1942?

A. 1942—I guess so, because that year I wasn't Chairman, but I know about who was Treasurer.

Q. How about 1941?

A. 1941, I forgotten. [30]

Q. But you know then of your own knowledge for 1942 on through 1945, he was the Treasurer for the Chinese Relief Association?

A. Yes, I been here 1942.

Q. And that money was turned in to him from these collections you testified to? A. Yes.

(Testimony of Fred Wong.)

Q. What did he do with the money, Wong, do you know?

A. The money we turned in to him to keep them first and then we—to keep it, and we send back to China.

Q. As far as you know, were you able to send any money to China in 1942?

A. 1942—you mean—might be a little bit, some of it, but I forget how much.

Q. Why couldn't you send any money in 1942?

A. 1942, I think we—we had meeting, say that the Japs got the money so we afraid to send them.

Q. Now, you know that the United States went to war in December, 1941

A. Yes; at that time I wasn't here. Yes, I know, but I wasn't in Phoenix.

Q. Do you know whether or not after the war was declared between Japan and the United States whether Kok Si was able to send any money he had in his possession belonging to the Chinese Relief Association back to China? [31]

Mr. McAlister: Do you understand the question?

A. Yes. You mean after the war?

Q. (By Mr. Flynn): Yes.

A. Yes, we had meeting—

Q. No, I don't think you understand it. Was he able to send any money to China after the United States went to war with Japan?

A. After United States—Japan—after that, no, not much.

(Testimony of Fred Wong.)

Q. Do you know why he was not able to send it?

A. We thought Japanese—they take all mail. When mail get in China they get mail and they open mail, and they find check, and they take money.

Q. So for that reason, what did Kok Si do with the money, did he just keep it?

A. Yes, just keep it, yes.

Q. How often would the officers of this Association meet, or meet to discuss this situation; did you have any regular meeting time?

A. No regular meeting. Any business we had to talk over, then we call meeting.

Q. Do you remember just before Kok Si was arrested along about the 7th of October that you had a meeting where he made a report to the Association, do you remember that meeting?

A. Yes, I think we had a meeting about that time. [32]

Q. That would be about the 7th of October, 1945? A. Yes.

Q. And he reported to the Association, he made a report to the Association?

A. Yes, he report.

Q. Did he tell the Association at that time how much money he had that he was holding for the Relief Association?

A. Yes, he so report. He said he had about—between, I think \$14,000, something like that.

Q. Approximately \$14,000? A. Yes.

Q. That is what he reported to the Association?

(Testimony of Fred Wong.)

A. Yes, just about. He said a few more, maybe a little bit more come from little town like other town, he said that about how much he had.

Q. Then he said approximately \$14,000?

A. Yes, just about. I heard what he says, but maybe little bit more, little bit less.

Q. Did you know where that money was, Fred; did you know where he kept that money?

A. I don't know. People say——

Q. Not what the people say, but do you know yourself?

A. I think he kept in the safe, kept in his safe.

Q. And you know that Kok Si was arrested by the Narcotic Agents in October? [33]

A. You mean, I know who——

Q. I mean you know he was arrested, you weren't here?

A. Yes, I am not there, but I know it.

Q. And after his arrest did he turn over any money to you as Chairman of the Chinese Relief Association? A. No.

Q. Have you ever gotten any of that money?

A. You mean he turn that money back to me? No, he never did.

Q. As far as you know, did he turn it over to any member of the Chinese Relief Association after his arrest? A. No.

Q. Do you know what happened to the money he had?

A. Well, you mean what happened to the money——

(Testimony of Fred Wong.)

Q. What happened to this \$14,000 that he had.

A. No, you mean——

Q. Do you know what happened to it?

A. No—yes, I read the papers. The policemen take the money.

Q. You read in the papers that the policemen took the money out of the safe? A. Yes.

Q. Fred, do you know whether or not Kok Si kept any books? You know what books are? You are in business, aren't you, you keep books in your store?

A. Yes, I think he had books, but I don't know, but [34] sometimes read very good—he didn't see very good, but I know he had books.

Q. You know he had books for the Chinese Relief Association? A. Yes, all Chinese.

Q. As far as Kok Si was concerned, did he have any interest or did he own any of this approximately \$14,000; did that belong to him or did that belong to the Chinese Relief Association?

A. Well, he supposed to what—we had \$14,000 in his hand anyway.

Q. In other words, he had approximately \$14,000 in his hand? A. Anyway.

Q. That was not his money?

A. That must be he owe our Association \$14,000.

Q. In other words, he was the Treasurer of the Company? A. Yes.

Q. He had that much money belonging to the Association? A. Yes, that is right.

(Testimony of Fred Wong.)

Q. And that \$14,000 was not his?

A. Must be not his, that belongs to us, because he Treasurer to keep money.

Q. Have you personally, or has the Chinese Relief [35] Association gotten any of that money back? A. You mean personally?

Q. Yes, have you personally, or has the Chinese Relief Association ever gotten any of that \$14,000 since he was arrested? A. Got from him?

Q. From anybody? A. No.

Mr. Flynn: That is all.

Cross-Examination

By Mr. McAlister:

Q. You said you lived in Phoenix about four and one-half years? A. Yes.

Q. And you have known Kok Si since shortly after you came here? A. Yes.

Q. You have been in the grocery business all of that time? A. Yes, yes, sir.

Q. When did you first become a member of the Relief Association?

A. When? How I got in?

Q. When did you first become a member of it?

A. Well, we—I been here last year, 1942, and then [36] they elect me Chairman in 1943—'3 '4, '5, '6—yes, I think '42—yes, '43, yes, yes.

Q. How does anyone become a member, just by making a donation, does that make them a member?

A. I don't get you.

(Testimony of Fred Wong.)

Q. How does anyone become a member of the Association, just by making a donation? Does that make them a member?

A. Well, I suppose all the Chinese—we don't need any member card, all Chinese supposed to be member. They had the duty to help for this Association.

Q. You say you were elected Chairman in 1943 first? A. Yes, 1943.

Q. How did they do that? Did they have a general meeting, or how did they elect their officers?

A. Oh, same like Major, judge by name.

Q. Did they have an annual meeting or a banquet, or something where they do that?

A. Not on that night, night for the election, nomination for the name, and then put them up and put all the Chinese who work for to get more voice.

Q. Where was that meeting held?

A. In the Chinese School.

Q. In the School? A. Yes.

Q. How frequently did they hold meetings?

A. Huh? [37]

Q. How frequently did they hold meeting?

A. How often?

Q. Yes.

A. We don't have regular meeting, but we—when we have some business then I called the meeting, call those what we call directors come to the meeting.

Q. You had a Board of Directors?

A. Yes.

(Testimony of Fred Wong.)

Q. How many members were on that?

A. We had about 30.

Q. Did you have a Vice President and Secretary?

A. Yes.

Q. A Vice Chairman?

A. Yes.

Q. And as far as you know, Kok Si had always been the Treasurer of the organization?

A. Yes, since I been Chairman he be Treasurer to now, but I think before too.

Q. And he kept the records of all the transactions?

A. Yes, he had his own records.

Q. You said because of his poor eyesight he was not able to keep it as accurately as he might?

A. No.

Q. You said because his eyesight was poor he didn't keep them as good as he might?

A. Keep the money? [38]

Q. Keep the records as good as he might because of his eyesight?

A. Yes, he had record, and when to turn money in, in what day, he received for so much money.

Q. Did he ever exhibit the records to you?

A. Mostly the bookkeeper take it and then they report to me.

Q. He would report to you?

A. Yes, when we had meeting.

Q. Kok Si would do it at that time?

A. Yes.

Q. You said, I think, that they had a meeting in October where you made a final report. When was that meeting?

A. October?

A. Yes, 1945.

(Testimony of Fred Wong.)

A. '45, '46, yes, we had great big meeting on that day.

Q. Was that a big banquet meeting that they had up at the Westward Ho? A. Yes.

Q. I believe you had one there in August about right after the Victory Parade, didn't you?

A. August? Might be that one is, I forget. August might be we gave banquet to the Cadet boy from the Luke Field; might be. [39]

Q. How about the expenditures of the organization, how was that handled? Was that taken up by the Board of Directors? A. Yes.

Q. When you wanted to spend money or something, did you take that up before the Board of Directors?

A. Yes. We didn't need for small money. We just tell Treasurer, "You pay out \$20, hundred dollars." If big money, then we had meeting, yes.

Q. Did you have a meeting in order to pay for this banquet at the Westward Ho or not?

A. Yes, you mean—yes, that all had to pay by the China War Association.

Q. They authorized you to pay this?

A. Yes, all expense.

Q. Do you know how the money was sent to China whenever it was sent there; do you know what method was used in sending the money?

A. What money?

Q. What method, how they send it to China?

A. How we sent it?

Q. Yes.

(Testimony of Fred Wong.)

A. We send it like before, we send it back to Canton City, State of Canton, and hold delivery, and since the Jap occupation in Canton, and then we can't send any money, so we keep all the money in here. [40]

Q. You first sent that to a bank in New York or San Francisco, would you? A. Huh?

Q. You would first send it to a bank in New York or San Francisco?

A. Yes, we send some money to New York Bank of China in New York.

Q. Some items in your books show that you remitted or sent money to headquarters. Where would that be?

A. To headquarters? What headquarters?

Q. That is what I was wondering. It says, "Sent to headquarters." Does that mean to China or some place in the United States?

A. Might be sent to headquarters in China.

Q. I notice on some of these remittances that there are fairly large commissions, or a commission on some of these remittances. Does that go to the bank for sending it over, or what; do you know how that was handled?

A. You mean how the money goes to China?

Q. Well, from the time it left here?

Mr. Flynn: I don't think he understands the question.

Mr. McAlister: Who sent the money? Did Kok Si always send it himself or did he send it over to you and you sent it in?

(Testimony of Fred Wong.)

A. When we send money and Kok Si and keep the money, [41] go with the Secretary and send, sometimes I go to the bank. We have three men go to the bank.

Q. And you get a draft or a money order or something, or a Cashier's check?

A. Yes, we send Cashier's checks to the Bank of China and then we cash check, send to the Bank of China in New York City, then we go with a letter and tell them how much money we send to go back to China.

Q. Had you been down to Kok Si's place of business very frequently?

A. You mean his store?

Q. Yes, at 113—

A. Yes, when I get something I have to see him, I go down there.

Q. Was it about the business on the Relief Society?

A. Yes, when I have to go, I go.

Q. You buy from his Chinese food market there too, or his Chinese Association? He said he was selling Chinese foods and things; did you ever buy any of them?

A. You mean buy Chinese goods from his store?

Q. Yes.

A. Not much, because we don't eat much Chinese food.

Q. But you only went there when it was necessary on business of some kind, you didn't go there regularly?

A. You mean myself?

Q. Yes. [42]

(Testimony of Fred Wong.)

A. Yes, I had store keep me busy all the time.

Q. You personally don't know exactly how he did handle the money he took in, do you?

A. That money?

Q. I mean you don't yourself know how he handled the money? All you know is what you heard from others, isn't that true?

A. The money, you mean, he held there?

Q. Yes.

A. Yes. When the money collection, the money just went in to him.

Q. You don't know whether he put it in the bank or kept it there?

A. I guess he had it in his safe.

Q. You just think he did?

A. I think he had it in his safe.

Q. You never made any check on that or observe him, did you? A. Checks?

Q. I mean you never observed him putting it in the safe, did you?

A. No, we hand it to him, because every time when we want some money to pay out some bills, he always open safe and bring money out.

Q. If he wanted to pay the bills on anything, he would open the safe and take the money out?

A. Yes. Any time we go we say, "Here is the bill and we need to pay for it, our Association," and he would open safe.

Q. You don't know whether he took the money out there to pay all of these other bills or not?

A. For his own bill?

(Testimony of Fred Wong.)

Q. Yes.

A. That part I don't know. I know my part.

Q. You know approximately how much that banquet cost you up in the Westward Ho in October, 1945? A. You mean the whole bill?

Q. Yes. A. Pretty big bill.

Q. Up in the neighborhood of \$3000, you think?

A. I know that meal cost over a thousand dollars besides the liquor and all kinds of beer, and the floor show, and it took money.

Q. Do you recall about the one they had in August? A. Huh?

Q. Do you recall about the banquet they had in August which you said might be for the Cadets?

A. Yes, might be, but I forget sure for what?

Q. Do you know how much that one cost?

A. I forget all but the big one—those not so big, I don't pay much attention to.

Q. What time in 1942 did you say you came here, Mr. [44] Wong? A. '42? What month?

Q. Yes. A. I been here July.

Q. You came in July? A. Yes.

Q. You don't know when you got here whether or not Kok Si was still in prison, do you?

A. I don't get you.

Q. Did you know that Kok Si had been in prison on a narcotic charge in the years 1941 and 1942? A. I don't know.

Q. You don't know that?

A. I didn't know him unless I came in Phoenix.

(Testimony of Fred Wong.)

Q. Did you meet him right after you came, or some little time?

A. Oh, I met him after two or three months, not right away.

Q. And when you first knew him, as far as you know, he was Treasurer of the organization?

A. Yes.

Mr. McAlister: That is all, I believe.

Mr. Flynn: One other question. [45]

Redirect Examination

By Mr. Flynn:

Q. Fred, while you have been Chairman of this Association, do you know whether or not any money was ever returned from the Bank of New York that you had sent to China, because they could not transmit it to China because of transportation difficulties? Do you understand my question?

A. You mean, they returned money?

Q. Have they ever returned money back to you because they could not get it to China because of the war?

A. It seem like they returned once, it seemed like they returned money once, so we had meeting and we—

Q. Just a minute, your answer was it seemed like once they returned some money? A. Yes.

Q. Do you remember about what year that was?

A. Might be—I don't know, '43 or '44.

Q. Now, do you know why they returned that money?

(Testimony of Fred Wong.)

A. They say—they might say something—tell we wait, something like that, until they go advise us again what they going to do.

Q. They could not send it to China at that time, so they sent it back to you? A. Yes.

Q. Now you testified that when you sent this money [46] to China, the three of you went down, you and Kok Si and one other party, would go to the bank and get a check from the bank?

A. Yes, if we want to send money.

Q. When you would start to the bank where would you get the money to turn over, the money to get the draft, from Kok Si?

A. I had to bring the money to buy the Cashier's check.

Q. Where would you go to get the money when you started to the bank, the three of you?

A, Oh, where he get the money? From his safe.

Recross-Examination

By Mr. McAlister:

Q. Did he always do that? A. Always do.

Q. Did he ever write checks for it?

A. Yes, he bring money and get into the bank and through the window ask the teller, and tell him he want to cash check. Then he pay money and get check.

Mr. Flynn: A Cashier's check? A. Yes.

Q. Bought a Cashier's check?

A. Yes, bought Cashier's check.

(Testimony of Fred Wong.)

Q. (By Mr. McAlister): Do you know whether he ever paid [47] for any of these Cashier's checks by a bank check? A. Yes.

Q. On his own—on his own bank account?

A. I think one time I go with him and they pay money and buy Cashier's check.

Q. Well, do you know whether he ever wrote a check to the bank to buy a Cashier's check with?

A. Yes, he buy Cashier's check and send to New York City.

The Court: He does not understand that.

Q. (By Mr. McAlister): Do you know whether Kok Si ever wrote a check on his own bank account and took the check and bought a Cashier's check with it, or not?

A. No, sir; he didn't write no check. He had no account.

Q. As far as you know, he had no bank account?

A. But I, one time, I saw him pay the cash to the bank.

Q. One time you saw him pay cash?

A. Yes.

Q. And as far as you know, he got it out of the safe? A. Yes.

Q. Was that the only organization you were connected with, the War Relief?

A. Yes—you mean the only one?

Q. Yes. [48]

A. Yes, the only one I remember with it, work together. That is the one I know. Besides, maybe some more, I don't know.

(Testimony of Fred Wong.)

Mr. McAlister: I think that is all.

The Court: We will have a brief recess now.

(Thereupon a short recess was taken, after which all parties being present as noted by the Clerk's record, the trial resumed as follows:)

Mr. Flynn: Mr. Singh.

YEE F. SINGH

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Flynn:

- Q. Will you state your name, please?
A. Yee F. Singh.
Q. Where do you live, Singh?
A. 517 North Fifth Street.
Q. How long have you lived in Phoenix?
A. How long I live in Phoenix? Since 1902.
Q. Since 1902. Are you in business at the present time?
A. In business, American Kitchen.
Q. Do you run the American Kitchen?
A. Huh?
Q. You ran the American Kitchen?
A. I ran American Kitchen 43 years.
Q. That is a restaurant here in Phoenix, is it not?
A. Yes.
Q. You ran that for 43 years?
A. Yes, 43 years.

(Testimony of Yee F. Singh.)

Q. Singh, you are quite well acquainted among the Chinese population in Phoenix, are you not?

A. Pretty—quite a few, yes.

Q. You know quite a few of them?

A. Yes.

Q. Are you a member of the Chinese Relief Association?

A. Chinese Relief Association? Yes.

Q. Do you know, Singh, when that Association was formed, when it started? A. Huh?

Q. Do you know when that Association started?

A. Since war. War bring it.

Q. What war was that?

A. Chinese war bring it in '37—1937, I believe.

Q. Was that in 1935 that China and Japan went to war, or 1937? A. 1937, I believe.

Q. You think it was 1937. I thought it was 1935, but [50] you are probably right.

A. No, 1937, I think.

Q. That Association, the Chinese War Relief Association was formed shortly after the China-Japanese War broke out? A. Yes.

Q. Will you tell the Court what the purpose of that Association was, why was it formed?

A. It formed that Association to raise moneys to send back to China—send back to Old Country to help, see?

Q. The Association was formed to raise money to send back to the people in China to help them?

A. Yes.

(Testimony of Yee F. Singh.)

Q. Now, Singh, can you tell us whether or not that Association continued up to, until the war was over with Japan?

A. I think war over in 1946—1945—

Q. Let me put it this way: How long did the Association continue to operate, from 1937 until 1946? A. Until 1946.

Q. Is the Chinese Relief—

A. 1945—I mean 1946.

Q. Is the Chinese Relief Association still functioning?

A. Still running? No, it is not running now.

Q. Not running now? A. No.

Q. It stopped after the war?

A. Yes, stop.

Q. In 1943, '44 and '45, do you know, Singh, who was Treasurer of the organization or the association? A. I was not Chairman.

Q. I was asking who was.

A. Oh, Kok Si?

Q. Kok Si? A. Yes.

Q. As Treasurer, do you know whether or not the proceeds that were collected; that is, the money that was collected from these different—

A. The money was collected, we had four different parties go east, north, south, west, eight people go out every month—

Q. Now, Singh, just a minute. A. Yes.

Q. Will you explain to us in your own words what the method was how you collected this money for the Chinese Relief Association?

(Testimony of Yee F. Singh.)

A. We go ask people to help, help country; everybody help raise it. We had easy way to get it. Everybody give. Some give large amount, some give small amount, see? [52]

Q. Did you, during those years 1942, '3, '4 and '5, appoint different Chinese to go out into the territories and collect money? A. Yes.

Q. And those committees or those men would collect the money from the Chinese? A. Yes.

Q. And also from Americans?

A. Some agency; quite a few here right now, see?

Q. When that money was collected, do you know what they did with it?

A. We all start early in the morning and come back in the afternoon and we turn it in, give to Kok Si.

Q. You turned the money in to Kok Si?

A. Everybody go out turn it in to him, see?

Q. How many times a year did you conduct these drives, where you went around collecting this money?

A. I forget all about it, but pretty near every month, every two months, or three months, or month, something like that.

Q. As far as your memory serves you, it was probably at least every two months?

A. Yes, not later than two months.

Q. In addition to this method you had for collecting this money, did you have other ways to collect money, like celebrations? [53]

(Testimony of Yee F. Singh.)

A. No, I never go collect money at all, just to ask people to help.

Q. Did you have jars or cans in the Chinese stores?

A. Oh, yes, yes, we have some cans, yes, can in different stores, see?

Q. And that was marked, "Chinese Relief Association?"

A. Yes, marked "Chinese Relief Association," every restaurant, every grocery, see?

Q. Every restaurant and every grocery store?

A. Yes.

Q. That money, likewise, as far as you know, was turned in to Kok Si as Treasurer of the organization?

A. It is all turned in to Kok Si, all accounts and everything, see?

Q. Now, Singh, do you know of your own knowledge, do you know personally where Kok Si kept that money when it was turned over to him?

A. What he was going to do with the money? He send some back, not report very much. Every China boy trust him too much, never ask him how much he got there, and when he send some money back, just once hold meeting and then he report send some money back, but not very often send money back.

Q. When he got the money, as far as you know, he would send it back to China? A. Yes.

Q. Do you know whether or not he was able to send that money back to China after the war with

(Testimony of Yee F. Singh.)

Japan broke out; that is, the war between the United States and Japan?

A. I don't know—quite sure—I never ask him anything that way.

Q. Were you present at the Association meeting that was held in October of 1945, where Kok Si reported to the Association on how much money he had in his possession?

A. Yes, hold meeting, told he send some money back, but he never did.

Q. Did he tell you how much he had in his possession belonging to the Association?

A. No, he didn't. I never ask him; I never ask him how much Association have money; I never ask him, friend that way.

Q. You trusted him?

A. Yes, I trust him.

Q. I mean, Singh, do you remember attending a meeting in October, 1945, where Kok Si told all the Chinese boys how much money he had belonging to the Relief Association?

A. I believe he did, but I don't remember how much he say. I know he call meetings all right, he call meeting about two or three day after that, and then he got arrested. [55]

Q. He called a meeting and about two or three days later he was arrested? A. Yes.

Q. As far as your memory serves you—

A. That is as far as I remember.

Q. Do you know where Kok Si kept this money that he collected from different members of the Relief Association; do you know whether he put

(Testimony of Yee F. Singh.)

the money in the bank or whether he kept it in the safe there at 113 East Madison?

A. He put in the safe. Every time I see him put in the desk there, count out how much it was, for different party, people, know, go out of town.

Mr. Flynn: I think he was going to say that four or five different parties go out and he put the money in the safe.

Q. As far as you know, the money he had belonged to the Chinese Association and he put that in the safe?

A. I know he put money in the safe, all right, but I don't know money belonged to the Association.

Mr. Flynn: I believe that is all.

Cross-Examination

By Mr. McAlister:

Q. You are running the American Kitchen again, aren't you, Singh? [56]

A. Yes, 43 year, 44 years. I still have in 44.

Mr. Flynn: I don't think he is running it now, but it doesn't make any difference.

Q. (By Mr. McAlister): Were you ever an officer in this Chinese Relief Association?

A. Yes.

Q. Were you ever an officer in it, the Chairman of it, or on the Board of Directors?

A. No, I just go along and help to do it.

Q. You just went out and helped collect it?

A. Collect the money, that is all.

Q. You were never a member of the Board of Directors, or Chairman, or Vice Chairman?

(Testimony of Yee F. Singh.)

A. No, whatever I get, bring back, I just found out how much it was and give the whole money there, and give the book and everything, see?

Q. You stated that the Association had stopped or quit shortly after the, you said 1946?

A. Yes.

Q. What did they do, just quit making drives, or what?

A. They can't make drive any more, we have no drive money, money is gone.

Q. Are they still having meetings?

A. Huh?

Q. Do they still have any meetings? [57]

A. No, not no meetings, maybe once a year, yes.

Q. What would they do with that money if they had it now? A. Money that go to Kok Si?

Q. Yes.

A. I don't know what he wants to do with it; how much money. I don't know what he going to do with it.

Q. You stated that apparently they had some trouble with the collections, somebody—some people charging them for collecting it, or what?

A. No, tried to collect around, money they didn't know where it go to. I wouldn't myself. I don't go ask people help any more.

Q. Do you know how they sent the money to China? A. Huh?

Q. Do you know how they sent that money to China?

A. Usually send by wire, see? That is what I

(Testimony of Yee F. Singh.)

hear, never seen any money, who do it, sending. I never ask them what they doing, see?

Q. How frequently did you go down to Kok Si's place? A. What is that?

Q. How often did you go to Kok Si's business on East Madison?

A. How often he send money back to China?

Q. No, how often did you go down to his place of business on East Madison? [58]

A. Oh, I go down every day when we go out collect money; few boy together bring that money back right in the afternoon, see?

Q. Would you always go down on War Relief business, or go down on other business?

A. No, not business of go back to the store, see?

Q. Well, did you ever buy anything from his store, any food for your restaurant?

A. I ever buy anything in his store, Sun Kwung Tong Company?

Q. Yes.

A. He didn't have nothing to buy.

Q. He didn't have anything? A. No.

Q. Had you been in his office very many times when he opened his safe?

A. No, I never been in the safe—you can't walk in like this private room with safe in it.

Q. You never went in his private room?

A. No, right in back there, right in back.

Mr. McAlister: I think that is all.

The Witness: All right, thank you.

(The witness was excused.)

Mr. Flynn: Mr. Toy. [59]

D. H. TOY

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Flynn:

Q. Will you state your name, please?

A. D. H. Toy.

Q. Where do you live, Mr. Toy?

A. Sixteenth Street and Camelback Road.

Q. In Phoenix, Arizona? A. Yes, sir.

Q. How long have you been in Phoenix?

A. Since 1915.

Q. And what business are you in, if any, at the present time? A. Grocery business.

Q. Are you a member of the Chinese War Relief Association? A. Yes, sir.

Q. How long have you belonged to that Association? A. Since 1937.

Q. Was that the date that the Association was formed?

A. Right after the Jap had fight against China, that is when we started it.

Q. It was started shortly after the Sino-Japanese War broke out? [60] A. Yes.

Q. What was the purpose of that Association?

A. Well, just collect the money for the boys in China.

Q. Will you speak a little louder?

A. Try to collect some money, you know, for helping China war relief.

(Testimony of D. H. Toy.)

Q. That was to collect money for the purpose of helping the destitute people people in China, is that your answer? A. Yes, sir.

Q. During the years '43, '44, and '45, do you know who was the Treasurer of that Association, Mr. Toy? A. Kok Si.

Q. How long had you known Kok Si?

A. Oh, I know him quite a while ago.

Q. How many years?

A. Long time, since he come to Phoenix.

Q. Say, ten years? A. More than that.

Q. And you know of your own knowledge that he was the Treasurer of the Chinese Relief Association for the three years, 1943, '44, and '45?

A. Yes, sir.

Q. Now, Toy, will you explain slowly and in your own words what method was used by the Relief Association during these years, and what was necessary to collect the [61] money to send back to China; that is, how did they get their money, and so forth?

A. I know I just go collect it outside of town, see, just go collect the money and come back and bring it back to the Treasurer, that is all.

Q. In other words, this Association had committees that made drives and went around and collected the money from different Chinese people?

A. Yes, sir.

Q. And they also had parties, did they not, and celebrations, Double Ten and Double Seven?

A. Yes, sir.

(Testimony of D. H. Toy.)

Q. And they had jars and cans for the Chinese Relief Association in stores for the Chinese Relief Association? A. Yes, sir.

Q. When that money was collected from these different ways that you testified to, what was done with the money, do you know?

A. Well, all we had collected the money, turned it over to the Treasurer.

Q. After the money was collected it was turned over to the Treasurer? A. Yes, sir.

Q. Who was the Treasurer? A. Kok Si.

Q. Was that turned in to him at his place of business at 113 East Madison?

A. That is the place, yes, sir.

Q. Do you know what he would do with the money after he got it; whether he would put it in the bank or put it in the safe?

A. I know he put that in the bank—I mean put it in the safe.

Q. As far as you know, he put it in the safe?

A. Yes, sir.

Q. Do you know whether or not Kok Si ever had a bank account? A. No, I don't.

Q. After the money was collected and turned in to Kok Si as Treasurer of this Association, did he then send it to China, as far as you know?

A. I don't know, that is not my job.

Q. In other words, your job was to collect it and turn it in to him? A. Yes, sir.

Q. Are you an officer in that Association, Mr. Toy? A. I am one of the members.

(Testimony of D. H. Toy.)

Q. You are just a member? A. Yes, sir.

Q. That membership during those years was composed of the Chinese people in the County of Maricopa, is that correct? [63] A. Yes, sir.

Q. Were you present at any meeting that Kok Si attended in October, 1945, when he made the report to the Association of the money he had on hand? A. Yes, sir.

Q. Do you recall how much he told the Association that he had for the Chinese War Relief Association?

A. The last meeting I was in there, he told about a little over \$14,000.

Q. In other words, this, Kok Si reported to the Association? A. Yes, sir.

Q. In October 5th, or 6th of October?

A. Something like that, yes, sir.

Q. That he had a little over \$14,000?

A. Yes, sir.

Q. Belonging to the Chinese Relief Association?

A. That is right.

Q. Did he also tell you at that time, or did he also tell the Association at that time that he was unable to send the money to China because of the war with Japan? A. That is right, sir.

Q. Did he tell you and the Association at that time that he had made efforts to send the money but he could not get it through?

A. No, he didn't tell me. [64]

Q. Do you know what happened to the \$14,000 that he told you he had on hand at that time?

(Testimony of D. H. Toy.)

A. Yes, sir; he said the Association had that much money on his hands.

Q. Do you know what happened to that \$14,000; do you know where it is now?

A. No, I don't.

Q. You don't know where it is? A. No.

Mr. Flynn: That is all.

Cross-Examination

By Mr. McAlister:

Q. How long did you say you lived here?

A. Since 1915, sir.

Q. '15? A. Yes, sir.

Q. You were almost born here, weren't you? You have known Kok Si ever since you came here?

A. That is right, yes, sir.

Q. And he was kind of a leader among the Chinese for quite a while, wasn't he?

A. Yes, sir.

Q. Did you ever go to his place of business?

A. Not very often.

Q. Were you ever an officer in the Relief Association, [65] or ever on the Board of Directors, or Chairman or Vice-Chairman?

A. I don't know about that time. I know last—Fred Wong is all I know is member of—

Q. He was Chairman? A. Yes, sir.

Q. Mr. Wong testified that they had meetings of a small group. Did you ever go to those meetings? A. Yes, sir.

Q. Sort of Board of Managers, something like that? A. Yes.

(Testimony of D. H. Toy.)

Q. In which they authorized the sending of money to China and to pay for the entertainment of the Cadets, or various other things?

A. Yes, sir.

Q. Motion pictures or banquets, and things like that. Did you go to those meetings?

A. Yes, sir; I did.

Q. And this last meeting that you speak of in October of 1945, that was a big meeting up at the Westward Ho? A. Yes.

Q. That was a sort of a final celebration, wasn't it? A. They had a celebration there.

Q. They used one of those big rooms up there?

A. Yes, sir. [66]

Q. And is that the meeting that Kok Si made the statement as to the amount that had been collected?

A. Well, he make meeting at his store?

Q. Before that?

A. Yes, about the amount of money.

Q. How long before, a month?

A. I think October 6th or 7th, I don't remember exactly the dates.

Q. And you have been a member of the Association ever since it started in 1937?

A. Yes, sir.

Q. Do you know whether Kok Si was Treasurer during all of that time?

A. Yes, I know he is all the time.

(Testimony of D. H. Toy.)

Q. Do you know who handled the funds during the two years that he was away in prison on that first narcotic charge?

A. No, I don't remember.

Q. You don't know who handled that in the two years? A. No, sir.

Q. Did you ever see the books of the Association? A. No, I never see books.

Q. He never went over those with you at any meeting, he just verbally reported how much he had on hand? A. Yes.

Q. Were you ever present when he purchased any of [67] these Cashier's checks which you sent to New York to forward to China? A. No.

Q. You never went with him? A. No.

Q. Were you ever in his office where he keeps his safe? A. No, I never been.

Q. Did you ever make any purchases from the store that he had there, or did he have anything that you needed? A. No.

Mr. McAlister: That is all.

Mr. Flynn: That is all.

(The witness was excused.)

Mr. Flynn: Frank Ong. Your Honor please, I'd like to use the Interpreter on this man.

The Court: All right.

FRANK ONG

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified through the Interpreter as follows:

Direct Examination

By Mr. Flynn:

Q. Will you state your name, please?

A. Frank Ong. [68]

Q. Where do you live, Mr. Ong?

A. 1037 East Jefferson.

Q. Are you the Chairman of the Wing Mae School of China Association? A. Yes.

Q. Now, is that just an association or a corporation, or just a committee?

A. Just an association.

Q. And as far as you know, when was that association formed, Mr. Ong?

A. It has been formed over ten years.

Q. How long have you been Chairman of the Association? A. About 16 years.

Q. There must be some mistake. He says it was formed over ten years, and he has been Chairman of it for 15 years.

A. Ever since it existed.

Q. Here in Phoenix? A. Yes.

Q. And what was the purpose of the forming of that association, Mr. Ong?

A. It was to have money to send back to China for support of the Wing Mae School.

Q. Where is the Wing Mae School located?

A. In Woo Long, Canton, Huaiping, China.

Q. That is just one school? A. Yes.

(Testimony of Frank Ong.)

Q. Now, who composes the association here in Phoenix, in Maricopa County; who are the members of this association?

A. Everyone that belongs to the Wing Mae District in China, which is approximately 20 merchants here in town belong to it.

Q. They belong to that association, the Wing Mae School in China? A. Yes.

Q. How would you secure the money that you sent back; from where did you get that; from what source did you get it?

A. Whenever they needed money they would write to me and I would get all of our members together and we would go out and ask for donations.

Q. Who was Treasurer of this organization during the years '43, '44 and '45? A. Kok Si.

Q. Do you know whether or not in October of 1945, when Kok Si was arrested, if he had any money in his possession belonging to the Wing Mae School in China Association? A. Yes.

Q. Do you know how much that was? [70]

A. Approximately \$1900.

Q. Did you turn that money over to Kok Si yourself?

A. The biggest part I turned over and some was turned over by different parties.

Q. Do you know of your own knowledge that in October, 1945, when he was arrested, that he had \$1900 belonging to the Wing Mae School in China?

A. Yes.

(Testimony of Frank Ong.)

Q. Do you know where he got that money?

A. I presume it was in the back, in the safe.

Q. Do you know whether or not he sent that money or any part of it to China?

A. This money was to be sent to China at some time through the Bank of China in New York, but it was sent back to us.

Q. I understand, now, he tried to send it, and it returned because they could not send it?

A. It was returned on account of not able to get it through.

Q. Do you know where that money is now?

A. I don't know where the money is now, it has never been returned to us.

Q. It has never been returned to you?

A. Never been returned.

Mr. Flynn: That is all. [71]

Cross-Examination

By Mr. McAlister:

Q. You stated you had been Chairman of this Association ever since it was formed in Phoenix?

A. Yes.

Q. Do you know anything about this school in China, what kind of school it is?

A. Yes, I know where it is in China, and heard from that school since.

Q. Since the war, that is? A. Yes.

Q. And where was it located in China, near what large city? A. Near Canton.

(Testimony of Frank Ong.)

Q. Do you know when was the last money that was sent to China?

A. No, it has been too long. I just remember when that money was sent back.

Q. Did they take up collections for this every year? A. Yes.

Q. Even after the war? They could not send it; they could not send the money—I mean they still take up collections? He said they had one remittance sent back on account of the Japanese occupation, and I want to know whether or not they continued to take up collections for the school after that. [72] A. No.

Q. Did Kok Si keep the books for the school all the time? A. Yes.

Q. He was Treasurer ever since you were Chairman of the Association? A. Yes.

Q. Did he ever show you the books? A. Yes

Q. How frequently?

A. Once in a long time.

Q. Were there any other officers besides yourself and Kok Si? A. No, just me and him.

Q. Did they hold meetings of the Association?

A. No, very seldom.

Mr. McAlister: That is all.

Mr. Flynn: That is all.

(The witness was excused.)

Mr. Flynn: Henry Gong.

HENRY GONG

was called as a witness on behalf of the plaintiffs,
and being first duly sworn, testified as follows:

Direct Examination

By Mr. Flynn:

Q. Will you state your name, please?

A. Henry Gong.

Q. Where do you live, Mr. Gong?

A. Chandler.

Q. Chandler, Arizona? A. Yes.

Q. What business are you in? A. Grocery.

Q. How long have you lived in Arizona?

A. Since 1939—1929—since 1929.

Q. 1929? A. Yes.

Q. How long have you been in business there in
Chandler? A. Since 1929.

Q. You have been in business since 1929?

A. Yes.

Q. Are you a member of the Chinese Chamber
of Commerce, Mr. Gong? A. Yes.

Q. Is that a corporation? A. Yes.

Q. Is is a non-profit corporation? A. Yes.

Q. Do you remember when it was organized?

A. Oh, along about 1938 or 1939, I forget exactly.

Q. About February of 1939, is that right?

A. Yes.

Q. And who are the members of that Chinese
Chamber of Commerce?

A. Well, all the Chinese stores in the Valley.

Q. All the Chinese merchants in the Valley?

A. Yes.

(Testimony of Henry Gong.)

Q. Since the date it was organized down through the years since 1939, can you tell me approximately how many members it has had?

A. Oh, along about a hundred.

Q. About a hundred each year? A. Yes.

Q. Do you have officers in the corporation?

A. Yes.

Q. And who was the President? A. I am.

Q. Have you been President ever since it was organized? A. Well, sometimes.

Q. You are President now, are you not?

A. Yes.

Q. How long have you been President?

A. Well, the last year—for the last few years, I been for the last four years.

Q. The last four years? A. Yes, sir. [75]

Q. You were President in 1943, '44, '45 and '46, is that correct? A. Yes.

Q. Did you have a Treasurer during all of those years? A. Yes.

Q. Who was the Treasurer? A. Kok Si.

Q. Did you have any funds in 1945, in October, 1945, in the possession of Kok Si, as Treasurer of the Chinese Chamber of Commerce?

A. Yes, he had about \$800.

Q. That was your money in his possession?

A. Yes.

Q. Do you know where that money was kept, Mr. Gong? A. I don't know.

Q. Let me put it this way: Do you know whether or not Kok Si had a bank account?

A. Well, he kept it in his safe.

(Testimony of Henry Gong.)

Q. As far as you know, approximately \$800 was kept in his safe there at 113 East Madison?

A. Yes.

Q. He didn't, as far as you know, have a bank account and kept the money in a bank?

A. No.

Q. Do you know what happened to that money, Mr. Gong? [76]

A. Well, until I read the paper.

Q. Well, it was taken by the Government agents, as far as you know? A. Yes.

Q. Have you ever received any of that money back? A. No.

Q. And as President of the corporation, do you know whether any other member of that corporation; that is, the Chinese Chamber of Commerce, have gotten any of that \$800 back? A. No.

Q. Where did that money come from; how did you happen to have that \$800 on hand?

A. Well, we get it by dues every month from the members.

Q. In other words, that represents dues that is paid by the members, monthly dues paid by members? A. Yes.

Mr. Flynn: That is all.

Cross-Examination

Mr. McAlister:

Q. You say you have been President off and on ever since it organized?

A. In the last four or five years.

(Testimony of Henry Gong.)

Q. And Kok Si was Treasurer during all of that time? [77] A. Yes.

Q. And had he been Treasurer before that?

A. Yes, I think so.

Q. Or do you know? A. Yes.

Q. And this \$800 represents dues, you say?

A. Yes.

Q. Did he keep the books of the organization?

A. Yes.

Q. Did he ever show them to the members that you know of?

A. Oh, yes, any time—we kept meeting, you know, to make reports and see how much money we got left.

Q. He would show you the books or——

A. Just make—tell us.

Q. You have not seen them yourself?

A. No.

Q. Examined them? A. No.

Q. And this approximately \$800, how long had he had it, do you know?

A. I don't know, probably be a long time.

Q. Might have had it a long time?

A. Yes.

Q. They collected dues every year?

A. Yes. [78]

Q. How much was it?

A. Five Dollars each.

Q. Who collected it, did he collect it, or do this, or did you collect it?

A. Sometimes we send somebody to go around and collect it.

(Testimony of Henry Gong.)

Q. Just send somebody around?

A. Yes, sir.

Q. This covers all of the stores in the Valley?

A. Yes.

Q. There is only one Chinese Chamber of Commerce?
A. That is right.

Q. And does the Chinese Chamber of Commerce have a bank account?

A. I don't know whether I understand.

Q. Does the Chinese Chamber of Commerce have a bank account?

A. Yes, we have one one time.

Q. You have one?

Mr. Flynn: He said he had one at one time.

Q. (By Mr. McAlister): Do you have one now?

A. No, we don't have one.

Q. Where did you have it?

A. What you mean?

Q. What bank did you have it in?

A. I think First National Bank. [79]

Q. First National Bank. Do you know when it was opened?
A. No, I don't know.

Q. Did Kok Si always handle all of the funds?

A. Well, not always, but sometimes when he is Treasurer in the Association.

Q. You wouldn't know whether or not there was a bank account in the name of the Chinese Chamber of Commerce of record in the Valley National Bank at the present time, would you?

A. We don't have one now.

(Testimony of Henry Gong.)

Q. You don't have it now. You don't know how long since they have had it?

A. I don't know.

Q. When there was an account, did you authorize the opening of it, or one of the officers of the Association, or do you recall?

A. Well, we always keep some money in Kok Si's place because lots handy to keep money, and when we get a little extra money we keep in bank.

Q. You don't have an account, then?

A. We don't have any more now, we used all the money.

Q. And was it closed, do you know?

A. I think about one year ago.

Q. About a year ago. Do you remember how much there was in the bank during that—— [80]

A. I think around about a thousand dollars.

Q. Do you know whether it might have as much as \$1400? A. I don't know.

Q. In 1941, do you know whether there was——

A. I don't know.

Q. You don't know. If the bank records should show there was as much as \$1400 between various times from April, 1941, until the 31st of December, 1945, that would be correct, would it?

Mr. Flynn: Well, this witness can hardly answer that question, if the Court please.

The Court: He doesn't know anything about it.

Mr. McAlister: Let me ask another question, then: Do you know whether or not you signed an

(Testimony of Henry Gong.)

account card with the Valley National Bank so that you could sign checks?

A. Yes, I have to take four men to sign it. Yes, I am one that signed them.

Q. You are one that could sign them?

A. Yes.

Q. And Gee Sing? A. Yes.

Q. And Henry Yen? A. Yes.

Q. And Tony Kim, that is your Secretary, or he was? [S1] A. Yes.

Q. And you say you have not examined the books of the Chinese Chamber of Commerce yourself personally? A. What?

Q. You have not examined the account books that Kok Si kept yourself? A. No.

Q. You stated, I believe, that Kok Si had been Treasurer of the Chinese Chamber of Commerce since it was organized here, as far as you know?

A. Been changed two or three times, but I don't know.

Q. Do you know who took care of the funds during 1941 and 1942 while he was in prison serving a narcotics term? A. I don't remember.

Mr. McAlister: You don't remember who kept the funds or kept the records. That is all.

Mr. Flynn: That is all.

(The witness was excused.)

Mr. Flynn: Mr. Lung.

YUEN LUNG

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified through the Interpreter as follows: [82]

Direct Examination

By Mr. Flynn:

Q. Will you state your name, please?

A. Yuen Lung.

Q. Where do you live, Mr. Lung?

A. 1023 East Jefferson.

Q. What is your occupation?

A. Merchant.

Q. Are you also a principal of the Chinese School of Phoenix. A. Yes.

Q. How long have you been principal of that school? A. Since 1932.

Q. Where is that school located?

A. 128 Second Street.

Q. How long has that school been in operation?

A. 14, 15 or 16 years.

Q. And what is the purpose of that school?

A. To teach our Chinese boys and girls the Chinese language.

Q. I understand that these Chinese boys and girls in the different communities attend an American school, but they receive their Chinese education by attending this school, is that correct?

A. Yes.

Q. How many teachers do you have, Mr. Lung?

A. Used to be two, and during the war there was only one.

(Testimony of Yuen Lung.)

Q. How is that school financed?

A. The original capital donated by Chinese people, and later expenses were furnished by tuition from the students and through donations.

Q. In October, 1945, who was acting as Treasurer for that Chinese School of Phoenix?

A. Kok Si.

Q. Did he have any money in his possession belonging to the Chinese School of Phoenix Association in October, 1945? A. Yes, \$1500.

Q. Who delivered him that money, if you know?

A. I delivered it to him.

Q. Do you know where that money is now?

A. I turned this \$1500 over to Kok Si, and it was in his keeping.

Q. Have you ever gotten that \$1500, or any portion of it back? A. No.

Q. And that \$1500 belonged to the Chinese School of Phoenix Association? A. Yes.

Q. It didn't belong to Kok Si? A. No.

Q. Or any part of it?

A. It belonged to the school.

Q. He was keeping the money as Treasurer for the Association, is that correct?

A. Yes, I turned it over to him.

Q. Do you know where Kok Si kept that money?

A. I turned it over to him and he kept it, but I don't know where.

Mr. Flynn: That is all.

(Testimony of Yuen Lung.)

Cross-Examination

By Mr. McAlister:

Q. How long have you lived in Phoenix, Mr. Lung? A. 36 years.

Q. And you have been principal of the school since 1932? A. Yes.

Q. Is the school running at the present time?

A. No, the teacher has been away and I have been unable to obtain another one.

Q. How long ago was that?

A. Approximately three or four years.

Q. And it has not operated, then, since his death, or her death? A. No.

Q. How often was this money collected for the school? [85] A. About once a year.

Q. When was the last money collected, do you know?

A. I don't remember the exact time. There had been money coming in from the school children all the time while it was in operation.

Q. Has there been any collected since the teacher died? A. No.

Q. During its operation, how much would you collect during the average year?

A. It would amount to thirteen to fifteen hundred dollars at time, and it would amount from twenty-five to twenty-five to twenty-seven hundred dollars at times.

Q. How much was the teacher paid?

(Testimony of Yuen Lung.)

A. Used to be \$75 a month, and towards the latter part of—while the school was in operation it was raised to \$125 a month.

Q. Who paid the teacher?

A. He would take the money if there was money from the books that he kept, and if there wasn't enough, Kok Si would pay it.

Q. In other words, he would pay it out of his own pocket—

A. I will explain that. The school teacher would take the money from his own fund to pay himself, and whenever there wasn't enough, he would get it from Kok Si. [86]

Q. Then Kok Si had a reserve fund, is that right? A. Yes.

Q. The students would bring in money every week or every month, and the teacher would collect it? A. That is right.

Q. Did the Association back this school, or what?

A. Me and Mr. Toy and Mr. Yee F. Singh, and Kok Si, the whole bunch would back the school up.

Q. Did they have any organization at any time, or was this just informal?

A. Yes, there was an association.

Q. Was Kok Si treasurer of that association?

A. Yes.

Q. Did he always keep the records—did he?

A. Yes.

Q. Is that the record book you have with you?

A. This record book was kept by the school teacher.

(Testimony of Yuen Lung.)

Q. Kept by the school teacher, the one that died?

A. Yes.

Q. When was the last entry made in that book?

A. August.

Q. August of this year? A. 1943.

Q. How long have you known Kok Si?

A. 17 or 18 years.

Q. Did you frequently go to his office on those [87] matters? A. Very seldom.

Q. You don't know of your own knowledge whether he kept the school money?

A. I turned it over to him. I presume he kept it in his safe.

Q. Do you know when he went back to China?

A. A few months ago.

Q. You don't know whether or not he had any money with him when he went, do you?

A. I don't know. I asked him for this money and he told me all of the money was taken by the Government.

Q. You don't know whether he had any place where he kept money besides that safe?

A. No.

Q. Did he ever show you the books of the school?

A. No, he never showed them to me. He would just show them to the school teacher. The school teacher showed them to him.

Q. That record you said was kept by the school teacher, was that record kept during the time Kok Si was in prison on that narcotics charge?

A. He was here.

(Testimony of Yuen Lung.)

Q. Kok Si was here. Do you remember the time when he was in prison? A. When? [88]

Q. That is what I am asking you, if you remember the time, 1939 and '40?

A. Yes, I heard about it.

Q. '41 and '42, I believe, is the correct time. Are you going to offer this record in evidence, Mr. Flynn?

(No response from Mr. Flynn.)

Mr. McAlister: No further questions at this time. We might want to put that book in evidence, we don't know.

The Court: All right, we will suspend until two o'clock.

(Thereupon a recess was taken at 12:00 o'clock noon.)

January 15, 1947, 2:00 o'Clock P.M.

All parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:

Mr. Flynn: Your Honor please, in the taking of the deposition there were some exhibits marked for identification, being Exhibits—Plaintiffs' Exhibits A, B, C, D, E and F, which were marked for identification by the witness Kok Si in the deposition, and which we introduced in evidence when the deposition was taken. I'd like to introduce those in evidence as a part of the deposition. I think as a matter of procedure they go in anyway with [89]

the deposition, and which is explanatory in the reading of the deposition. I offer them for what they are worth. They are accounts. I think there will be some additional testimony, and perhaps some stipulations on the variations of the accounts in some respects in the five causes of action. At this time I make that offer.

Mr. McAlister: We have no objection to them being admitted on that ground.

The Court: All right.

(The documents were received and so marked.)

Mr. Flynn: With that, if the Court please, we rest. [90]

DEFENDANT'S CASE

January 14, 1947.

Mr. McAlister: Mr. Harman.

W. J. HARMAN

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. McAlister:

Q. Will you state your full name?

A. W. J. Harman.

Q. What official position, if any, do you hold with the Treasury Department?

A. Supervising custom agents, which is custom agency district with headquarters at El Paso, Texas.

Q. How long have you held that position?

A. Since I have been in El Paso, since 1942, January 1st.

(Testimony of W. J. Harman.)

Q. And you were in that position in October, 1945? A. Yes, sir.

Q. And in connection with that position, you were in Phoenix at that time?

A. Yes, sir; I was.

Q. Did you have occasion in connection with the narcotics investigation to make the arrest of Kok Si? A. Yes; I did. [91]

Q. At his place of business on East Madison Street? A. Yes, sir.

Q. We might save time if you will briefly describe the details of that, Mr. Harman.

A. We had warrants for Mr. Kok Si's arrest and some other Chinese. We went to his place of business about, between seven-thirty and eight o'clock on the night of October 11th, and he was in his place of business, and placed him under arrest, and he was sitting—he was first out in front. There is a little place, a small room, and it has a counter on one side, and in back there is a little, small office, and he walked back in there and sat down in the chair, and we were looking around the office and asked him if—to open his safe, and he said the safe was open, so I pulled the door open and it was stacked full of money. It was a small safe, probably, about, I should say, 24 inches wide, and about 36 inches high, approximately, maybe a little bit smaller, and there were three or four compartments in the safe, and in the bottom part there was a lot of packs of coins of various denominations, and the whole thing in the back was packed full of

(Testimony of W. J. Harman.)

money, and we took the money out and put it in the box and brought Mr. Kok Si up to the Narcotics Office up in the Federal Building, and Mr. Vader and myself counted it for Mr. Kok Si. Mr. Vader is Assistant Supervising Agent. [92]

Q. And who else was present?

A. Who else was present?

Q. Yes. A. At the office?

Q. Yes.

A. Well, Mr. Talent and Mr. Smith—Mr. Earl Smith, and either one or two of the Wongs, maybe three of them, I am not sure whether the three of them, sons of the older man. I am not sure whether he was there or not.

Q. Kok Si was there?

A. Yes, he was there.

Q. You counted the money in his presence?

A. We counted the money in his presence and told him how much it was, and it would be counted, and asked him if that was correct, and he said that as far as he knew, it was.

Q. How was this money located in the safe when you found it, Mr. Harman?

A. It was stacked in the back of the part of the safe, full on the shelves. I forget if there was four or five compartments there, and each one was packed full of money of various denominations, but, of course, the smallest bill was a dollar bill and the highest was a thousand dollar bill.

Q. Was the bundle packed in packages? [93]

(Testimony of W. J. Harman.)

A. There were only one or two packages with rubber bands. Most of it was stacked in big stacks and not packaged at all.

Q. Was there any notation or anything fastened to any of the packages? A. No, sir.

Q. I understand that in making an investigation in narcotics cases that the Government, on occasion, would use some marked money.

A. We did use, I think it was \$8,650 over a period of several months. I think it started in March, 1945, and extended up until October.

Q. And in checking this money did you find any of that marked money?

A. We found \$3100 mixed up in that money of the money we had used.

Q. Was it in any one bundle?

A. No, sir. There were several \$100 notes in one package, in between one of these spaces, and the rest of it was mixed up all around. There was no particular order at all as far as we could tell.

Q. There were no notations in or on the stuff concerning the——

A. There were no notations at all. The only money that was packaged at all was a few—I think there was one package of \$500 bills with a rubber band around it, [94] and there was another package with a rubber band, but there was no labels on the money at all.

Q. At the time you were counting it there in Kok Si's presence, did he make any statements about the ownership of the money?

(Testimony of W. J. Harman.)

A. No, he said nothing at all. He just sat there and watched us count, and the only thing he said, we asked him if that was the correct amount, and he said as far as he knew. That is all he said.

Q. You didn't find any opium in that safe, did you? A. No, we did not.

Q. That was in another location. I think that is all.

Cross-Examination

By Mr. Flynn:

Q. Mr. Harman, I believe you stated the Supervisor of Customs Headquarters was at El Paso, is that correct? A. That is correct.

Q. After you counted the money and ascertained the correct amount, did you give Kok Si a receipt or any memorandum indicating how much you had taken? A. Yes, sir.

Q. Do you know where that receipt is?

A. I haven't the slightest idea.

Q. Do you recall the amount that was taken?

A. I haven't the records. The only thing we put on the receipt was the money, which I think it was something over \$32,000.

Q. It was in excess of 30,000, as best your memory serves you?

A. I am not sure of that amount, but I know it was over 30,000.

Q. As far as your record is concerned, and did that include the Cashier's check that we have introduced in evidence as Plaintiff's Exhibit A?

A. The amount I am talking about is nothing but cash.

(Testimony of W. J. Harman.)

Q. But you didn't include this?

A. The amount of cash. I don't remember just exactly what it was including the checks.

Q. As far as the cash is concerned, then it exceeded 30,000, to the best of your recollection, at that time?

A. I think it was 32,000. I think the records will show. I am sure it was in excess of \$30,000.

Q. What disposition did you make of that money?

A. We turned it over to the Internal Revenue.

Q. Where it is now. And what was done with it you don't know?

A. I haven't the slightest idea.

Q. In addition to the \$30,000 in cash and the Cashier's check there, was there any other securities or——

A. There was some United States Government Bonds, I [96] have forgotten now the amount. We had a record of this too, and then in the safe there was also a few Chinese War Bonds, and over in the desk on the other side in the office there were a great number of Chinese War Bonds, or what we understood to be Chinese War Bonds, which we did not take, left them there.

Q. You left the Chinese War Bonds and took the United States Government Bonds?

A. As I recall, we took those and had them at the office at the same time we had the money.

Q. Do you remember how many there were; would you say four or five, or two or three?

(Testimony of W. J. Harman.)

A. As I recall, there was about between five and seven thousand dollars worth, but I am not sure how much they were. We had a record of it. I don't know what it was.

Q. Do you have that record available—as near as you can recall, there was between five and seven thousand dollars in United States Government Bonds?

A. There were a number of Series E Bonds, and I think there was \$2000 of "G" bonds. I don't remember it.

Q. Did you notice the bonds; who the payee was on those bonds?

A. No, I think the majority of them were made to Ung Too Thet.

Q. Weren't one or two made to Sophie Dong?

A. There may have been. They weren't all the same person.

Q. They weren't all made to Ung Too Thet or Kok Si? A. I don't think so.

Q. Do you know what disposition was made of those bonds that did not show Ung Too Thet or Kok Si as payee? A. I don't know.

Q. You turned those over to the Internal Revenue Department?

A. I think they were. When I left they were at the office, I believe, the Narcotic Office.

Q. Did you get any books that night, Mr. Harman? You say Mr. Smith was with you. Did you pick up any books or memorandums, or did you pick up the cash?

(Testimony of W. J. Harman.)

A. There was a small box with just a few records. The records generally were left in his office.

Q. Do you know whether or not the agents later secured possession of his books?

A. I understand they did, but I didn't.

Q. You didn't yourself? A. No.

Mr. Flynn: That is all.

Mr. McAlister: That is all.

(The witness was excused.)

The Court: We will try and arrange to try this case at [98] ten o'clock in the morning.

(Thereupon a recess was taken at 2:00 o'clock p.m. of the same day. [100])

January 15, 1947, 2:00 o'Clock P. M.

Mr. McAlister: Earl Smith.

EARL SMITH

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. McAlister:

Q. Will you state your full name, please?

A. Earl A. Smith.

Q. What position, if any, do you hold with the Federal Government?

A. I am a Federal Narcotic Agent in the District of Arizona.

(Testimony of Earl Smith.)

Q. You were such during October, 1945?

A. I was.

Q. And as such Narcotic Agent, did you have occasion, along with Mr. Harman and others, to go to 117 East Madison Street in Phoenix, Arizona, on or about the 11th of October, 1945?

A. To 113 East Madison.

Q. 113? A. Yes, sir.

Q. At that time Kok Si, about whom there was considerable testimony, was arrested? [101]

A. Yes, sir.

Q. Was he arrested by you or one of the other agents?

A. He was arrested by Mr. Harman and another man.

Q. You were present at that time?

A. I was present shortly after his arrest.

Q. Were you present when Mr. Harman went into the back room where the safe was located?

A. I was in and out of the room where the safe was located, and Mr. Harman was there with Ung Kok Si.

Q. Mr. Harman, however, was the one who removed the money and other valuables from the safe?

A. Yes, sir.

Q. And after that what happened?

A. I later saw the money in our office at 211 Postoffice Building, in Phoenix.

Q. Who was present there?

A. Mr. Harman, Mr. Talent, and Captain Bert Smith, Customs Agent Vader, and myself.

(Testimony of Earl Smith.)

Q. Was Kok Si present? A. Yes, sir.

Q. At that time the money was counted?

A. Yes, sir.

Q. Do you know what the total amount of that was? A. \$32,000 and something.

Q. Was there some other bonds or—I believe there were some bonds mentioned yesterday? [102]

A. Yes, sir.

Q. Those were all itemized in the presence of Kok Si? A. Yes, sir.

Q. At that time did he make any statement concerning the ownership of either the money or the bonds, or anything else that was there?

A. I didn't hear him make any statement.

Q. Now, do you know what was done with the bonds? A. I returned them to Ung Kok Si.

Q. And he gave you a receipt, I believe, for those bonds? A. He did.

Q. How many were there?

A. 15, in denominations of \$1000, and one a denomination of \$500.

Q. How were they made out, Mr. Smith?

A. Made to Sing Lee Ong, Ng Too Sleek.

Q. How do you spell the last part of that?

A. N-g T-o-o S-l-e-e-k.

Q. Do you know whether or not that was another alias of Ung Kok Si? A. Yes, sir; it is.

Q. How many of the bonds were made out to him? A. Ten.

Q. You returned those to him, as I understand?

A. Yes, sir. [103]

(Testimony of Earl Smith.)

Q. And you had a receipt that was signed by him in the presence of Mr. Hickernell, the United States Commissioner, acknowledging receipt of those? A. Yes, sir.

Q. When was that dated?

A. November 20th, 1945.

Q. The money you received you turned over to the Internal Revenue Department, the Collector of Internal Revenue? A. I did.

Q. Do you know how much opium was seized at the time that arrest was made?

A. There was around 338 ounces.

Q. Do you know whether or not a tax was assessed on that opium?

Mr. Flynn: That is objected to, if the Court please. It is immaterial to the issues in this case.

The Court: He may answer.

A. Yes, sir.

Q. (By Mr. McAlister): Do you know the amount of it?

Mr. Flynn: The same objection.

The Court: The same ruling.

The Witness: \$8100.

Q. (By Mr. McAlister): That was taken by the Collector from those funds? A. Yes, sir. [104]

Q. I believe Mr. Harman testified yesterday that there were some marked bills in the money that was found. Did you observe any of those?

A. I observed the checking and finding of \$3100 of marked money.

(Testimony of Earl Smith.)

Q. Did you observe how they were located?

A. Sir?

Q. How were they located in the package of money that were found?

A. It was all through the entire amount of money brought up to the office.

Q. It was not just one or two bundles?

A. Well, it was in bundles, and among all the other bills.

Q. Did you know anything about, of your own knowledge, about Kok Si's business operations up until that time?

Mr. Flynn: That is objected to, if the Court please, it has no bearing on the issues in this case.

The Court: I don't know what you have in mind. I will have to sustain the objection.

Mr. McAlister: Well, I don't know even that he knows, your Honor. My reason for asking the question was, if he did have some knowledge, he might have some explanation for the reason that there was so much money around that place.

The Court: Well, I don't know. [105]

Mr. Flynn: Then it would be a conclusion of this witness at the outside.

Mr. McAlister: Well, if he doesn't know.

The Court: Well, I suppose the witness will testify that he was engaged in selling opium, and the Court will take judicial notice of that because he was convicted in this Court twice.

Mr. McAlister: That is all.

(Testimony of Earl Smith.)

Cross-Examination

By Mr. Flynn:

Q. I believe you said your name was Smith, is that right? A. Yes, sir.

Q. You counted the money there in the Postoffice Building at Room 211, and there was \$32,000 to the best of your memory, is that correct?

A. It was \$32,372.43.

Q. \$32,373.42? A. \$372.43.

Q. That was cash? A. Yes, sir.

Q. And then in addition to the \$32,372.43, there were 15 bonds in \$1000 denomination, and one bond \$500? A. Yes, sir.

The Court: That was \$15,500 in bonds? [106]

A. Yes, sir.

Q. (By Mr. Flynn): These 15 \$1000 bonds, I believe you testified, Mr. Smith, you returned to Kok Si as being his property?

A. Well, I returned them to him because they were seized from him.

Q. How about this \$500 bond?

A. Well, it was drawn to Ng Too Sleek, and I returned that, yes, sir.

Q. Are you sure, Mr. Smith, that those 15 bonds that you secured there were all made, or all had a payee which corresponded with one of the aliases used by Kok Si; do you have a list of them with the named payees in the bonds in your files?

A. They are right here.

(Testimony of Earl Smith.)

Q. May I see them?

A. Yes, sir, (handing document to Mr. Flynn).

Q. This Sing Lee Ong, is that another alias of Kok Si? A. I don't know.

Q. What disposition was made of those bonds, the \$300,000 bonds issued to Sing Lee Ong?

A. Those were returned to Ung Kok Si.

Q. Those were returned like this—

A. Everything listed there they returned to Ung Kok Si. [107]

Q. You don't know whether Sing Lee Ong was an alias used by Kok Si or not?

A. No, sir.

Q. Those others you have listed issued to Ng Too Sleek, spelled N-g T-o-o S-l-e-e-k, you returned those to Kok Si on the evening in question?

A. Yes, sir.

Q. And this bond that was issued here to Chester Dong, or Mrs. Jennie Dong? A. Yes, sir.

Q. That was returned, is that right?

A. Yes, sir.

Q. Then you took the \$32,372.43 and turned it over to the Internal Revenue Department; I mean you weren't concerned as to what disposition was made of it other than to turn it over to the Internal Revenue Department? A. That is right.

Q. You don't know where that money is now, do you, Mr. Smith? A. No, sir.

(Testimony of Earl Smith.)

Q. Your interest in the case was in the Narcotic Division? A. That is right.

Q. And in securing conviction on the evidence you had, and he pleaded guilty, and that is as far as you were concerned in the case, is that right?

A. Yes.

Q. So far as what the Internal Revenue did with the money or this case, as cash belonging to Kok Si as his personal property, you don't know, do you?

A. No, sir.

Q. Will you tell me, Mr. Smith, if you know, how you ascertained from any particular portion of the cash, or any bill of any particular denomination that was marked money so that you arrived at the conclusion he had \$3100 in amount?

A. Well, there were four purchases of narcotics made of \$2850, and most of the bills were denominations of \$100, so we got the serial numbers and the series of the bills so that we could check them against the money if we did find any in his possession, and we could identify it.

Q. That was the system used on the checking of the serial numbers and then tracing the bills through? A. Yes, sir.

Mr. Flynn: That is all.

Mr. McAlister: That is all.

(The witness was excused.)

Mr. McAlister: Mr. Whiteman. [109]

CHARLES MICHAEL WHITEMAN

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. McAlister:

Q. Will you state your full name, please?

A. Charles Michael Whiteman.

Q. Where are you employed?

A. Valley National Bank.

Q. In what capacity?

A. Acting Chief Clerk.

Q. As such, do you have general custody of all the account records?

A. I have access to them.

Q. Have you at our request—did you check your account records to find if there was an account in the name of the Chinese Chamber of Commerce?

A. I did.

Q. Was there such an account?

A. There was.

Mr. Flynn: Your Honor, we will stipulate for the purpose of saving time that the witness testified there was, but I think maybe I am confused, or perhaps Mr. McAlister is confused. I think the witness Henry Ong, on the witness stand this morning, testified the money [110] he had reference to, the \$4800, was kept by Kok Si. There probably was an account, and I think at the present time, though, the witness was confused, and I think the Treasurer of the Chinese Chamber of Commerce lives at Glendale.

(Testimony of Charles Michael Whiteman.)

Mr. McAlister: There seems to be considerable confusion in Mr. Ong's mind as to whether there was an account or not. He thought there was one. I was just trying to get this part of the record to shown when it was established.

The Court: All right, go ahead.

Q. (By Mr. McAlister): When was that account established?

A. The account was established April 28th, 1941.

Q. Who were the authorized signers on the account?

A. Three authorized signers, Yee F. Singh, Harry Gong and Harry Yen.

Q. That has never been changed?

A. Never been changed.

Q. There was no name of Ung Kok Si, Ong Too Thet, or Ng Too Sleek, no name like that was on there? A. No, sir.

Q. Is that bank account still active?

A. It is still there, yes, sir; active and still in the bank.

Q. What has the balance been running, on an average?

A. Well, it has only, since 1941, one deposit made, [111] and one withdrawal, and the balance is now \$1425.25.

Mr. McAlister: That is all.

Cross-Examination

By Mr. Flynn:

Q. Who are the names on that card, Mr. Whiteman? A. Yee F. Singh and Harry Gong.

(Testimony of Charles Michael Whiteman.)

Q. That is Henry Gong.

A. Henry Gong, and Harry Yen.

Mr. Flynn: That is all.

(The witness was excused.)

Mr. McAlister: Mr. Knapp.

FRED KNAPP

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. McAlister:

Q. Will you state your full name?

A. Fred Knapp.

Q. Where are you employed, Mr. Knapp?

A. First Phoenix Branch, First National Bank of Arizona.

Q. What position do you hold there, Mr. Knapp?

A. I am Chief Clerk.

Q. As such, you have general custody of the records [112] of the bank accounts?

A. Yes, sir.

Q. Is there a record in the bank account in your bank under the name of Sun Kwung Tong Company?

A. Not at the present time, no.

Q. Has there been? A. Yes, sir.

Q. What time was that account active?

A. Well, it was opened on the 24th of September, 1924, and by Ng Too—looks like Theat—maybe it is T h e t, which, I could not tell. There is also

(Testimony of Fred Knapp.)

another signature on that card too. It looks like Y-e-s-s A-t, and that is Ng Too.

Q. How much does that show at the time the account was opened? A. \$200.

Q. How long has the account been active?

A. Up until April 18, 1946.

Q. Was there any change in the name of the authorized drawer?

A. No, not that I can find out.

Q. How much money was in the account at the time it was closed? A. \$324.76.

Q. How much was there in the summer of 1945?

A. Well, it ranged anywhere from \$3500 to \$4700. [113]

Q. That was in 1945?

A. Yes, the balance in 1945, there was \$472 at the last.

Q. What about 1944?

A. 1944, anywhere from 2800 to 3700. In between there, there was \$9000 balance on November 2nd, 1944.

Q. 1943?

A. Well, on February 18th, there was about 2200 and December 21st, 1600. In between there, it fell down to about \$211 at one time.

Q. What was the highest it was?

A. About \$7000 on March 22nd.

Q. Does that show any large withdrawals in single amounts there or not, Mr. Knapp?

A. Well, \$5000 withdrawal on March 23rd.

Q. 1943? A. '43, yes, sir.

(Testimony of Fred Knapp.)

Q. I didn't ask you that on the other two years on any large withdrawals. Do you notice any withdrawals?

A. Here is a \$2000 withdrawal on, I guess it is August 12th, 1944, and there was one of 2500 on November 10th, 1944, and \$2810 the same date; that is, 1944. 1945, there was a \$2000 withdrawal on July 12th, and \$4000 withdrawal on November 15th. That is in 1945.

Q. Let's go on and get 1942.

A. 1942. A small balance of \$328 on May 12th, and [114] a large balance of \$2016.78 on December 31st. That is in 1942, and apparently there was no large withdrawals. \$600 seems to be the largest one.

Q. Any large exchanges in 1941

A. There doesn't seem to be any action in 1941.

Q. 1940, the same?

A. 1940 we had action, yes.

Q. What was it?

A. 1940, we started out with January 4th, a balance of \$5900.73, and ended up on September 28th, 1940, with a balance of \$28.84, and we had one large withdrawal of \$4000 on December 26th, 1939, and—that is the previous—had one for 2000 on February 1st, 1940, and \$5527.50 on August 12th, 1940. There is a few others of a thousand.

Q. 1939.

Mr. Flynn: Your Honor please, this is quite remote in point of time, going back to 1939.

(Testimony of Fred Knapp.)

The Court: Yes, I don't know whether that would be much of assistance.

Mr. McAlister: Well, it is rather remote except to show he ran an active bank account all the time.

Mr. Flynn: I think it is admitted in the deposition of Kok Si that he had this account, he kept this account. I don't know what is the materiality of this particular testimony except in so far as the status of the account may have been concerned in October, 1945. I don't think [115] there is any issue that he kept the account. He testified in the deposition he had an account.

Mr. McAlister: He may have testified he had a slight account.

Mr. Flynn: On Page 31, Charlie.

Q. (By Mr. McAlister): What was the balance of his account on or about October 11th, 1945?

A. \$4472.26.

Mr. McAlister: I think that is all.

Cross-Examination

By Mr. Flynn:

Q. Your account card shows, does it not, when that account was opened that there were two individuals to sign that account, and I think you said Ng Too Sleek and somebody named Yec Thet? Is that right? A. That is right.

Q. Has there been any change in the status of account with those names on it? A. No, sir.

Q. From the time of its creation to date?

A. No.

(Testimony of Fred Knapp.)

Q. Your records show that he made these deposits and withdrawals that you have testified to?

A. Who is the party that made them? Oh, I don't know.

Q. You don't know whether it was Ng Too Sleek or [116] Yee Thet that made those?

A. No.

Q. You are from the Phoenix National Bank, is that correct?

A. First National Branch.

Mr. Flynn: That is all.

Mr. McAlister: That is all.

(The witness was excused.)

Mr. McAlister: Freeman Stone.

FREEMAN STONE

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. McAlister:

Q. Will you state your full name?

A. Freeman Stone.

Q. Where are you employed?

A. First National Bank of Arizona, Head Office.

Q. In what capacity?

A. Assistant Cashier.

Q. As such, you have custody of the records of the bank accounts? A. I do.

Q. Do you have in your records any record of an account in the name of Sun Kwung Tong Company? [117] A. Yes.

(Testimony of Freeman Stone.)

Q. When was that account opened, Mr. Stone?

A. The account opened on January 2nd, 1931.

Q. By whom? A. By Ng Too Sleek.

Q. Is that the only name?

A. That is the only signature on the account.

Q. Has there been any change on it since the existence of that account? A. No.

Q. Is that account still active?

A. The account is now closed.

Q. When was it closed?

A. The account closed on April 16th, 1946.

Q. How much was in it at that time?

A. \$355.44.

Q. How much was in it in October, 1945?

A. At the end of October, 1945, a balance of \$3154.39.

Q. Do you have any balance for about the 10th or 11th of October?

A. On the 11th of October, the balance was \$5985.89.

Q. What was the highest balance during the year 1945?

A. The highest balance in the account was \$6421.85 on August 6th, 1945.

Q. In checking back through it, has there been any unusually high balances in that account since 1940? [118]

A. That balance in August, 1945, appears to be the highest balance during that period.

Q. Do you know whether that account has been reopened or not by anyone else?

A. If it has been reopened by anyone else?

(Testimony of Freeman Stone.)

Q. Yes. A. Not to my knowledge.

Q. Do your records show the issuance or the cashing of a check in the amount of \$1256.50 on or about the 13th of October?

A. According to our records there was a check for \$1256.50 paid on this account on October 13th, 1945.

Q. Was there one in the amount of \$1500 on the 16th? A. Yes.

Q. If I understand it, those cancelled checks were——

A. According to our records, the cancelled checks were mailed out.

Mr. Flynn: I don't understand the materiality of these cancelled checks and to whom they were mailed.

Mr. McAlister: We can't say from the record who they were made to.

The Court: Do you keep a close check on the cancelled checks in your bank?

A. We keep a picture in the bank. We reproduce and secure a photostatic copy of the checks.

Q. (By Mr. McAlister): How long will it take you to do [119] that if we needed several of them?

A. Possibly not over two days.

Q. You would have to run the reels back, would you? A. Yes.

Mr. McAlister: I think that is all.

Mr. Flynn: No questions.

(The witness was excused.)

KENNETH Q. N. WONG

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. McAlister:

Q. Will you state your full name?

A. Kenneth Q. N. Wong.

Q. Where do you live, Mr. Wong?

A. I live in New York City.

Q. By whom are you employed?

A. By the Customs Agency Service, District No. 2, New York City.

Q. You have been employed by the Customs Service for how many years?

A. Well, there was about nine years with the Service in China, and then about four years in New York City, with two years in the Armed Services.

Q. Two years duty in the Navy?

A. Yes, sir.

Q. You are familiar with the Chinese language?

A. I am, sir.

Q. Chinese writing and characters?

A. Yes, sir.

Q. And I believe last summer you were out here and examined these books that have been introduced as evidence or as exhibits in this case?

A. Yes; I did.

Q. And you checked the records and tried to come to a total amount shown due these various organizations about which the testimony has been given?

(Testimony of Kenneth Q. N. Wong.)

A. First I translated from Chinese into English page by page, and then while I was in El Paso they told me to arrange it so we could get a total. That is what I did too.

Q. Can you find the record there for the Chinese Chamber of Commerce?

Mr. Flynn: It is marked Exhibit B.

A. This is the one, (showing document).

Q. (By Mr. McAlister): Now, then, the plaintiffs have alleged in this complaint that there was—that Kok Si was holding a sum approximately \$800 for them, and that that is reflected in their books. Did you check the books to find out what that balance would show he owed [121] them?

A. Well, this balance is \$838.40.

Mr. Flynn: \$838.40? A. Yes, sir.

Mr. Flynn: Is that correct? A. Yes, sir.

Q. (By Mr. McAlister): That is the figure you arrive at from using that book there?

A. From the book.

Q. When was that last entry made on that book there, what year?

A. Well, there is no date, entry of the balance put in. There is a page torn between here.

Q. Page torn? A. Yes.

Q. What is the nearest date to it, identify it?

A. There is November 27th, I think, '39.

Q. November 27th, 1939?

A. That is the last date shown.

Q. Can you tell how accurately that was kept by bookkeeping methods or not, Mr. Wong?

(Testimony of Kenneth Q. N. Wong.)

Mr. Flynn: Just a minute. If the Court please, that calls for a conclusion and an opinion of the witness.

Q. (By Mr. McAlister): Are you familiar with Chinese bookkeeping systems?

A. Yes, I used to examine a number of these books in [122] China.

Q. In Hong Kong? A. Yes, sir.

Q. You examined them for the Customs there?

A. Yes, sir.

Mr. Flynn: The same objection, your Honor.

The Court: Well, he can tell whether they added correctly, can't he? Maybe that is what he means by accurate. He can tell how accurately they have been kept.

Mr. McAlister: If he is familiar with the system, why, he knows.

Mr. Flynn: Well, in any event, it would be a conclusion.

Mr. McAlister: Well, any expert will make a conclusion.

The Court: I will have to rely on somebody's conclusion. I can't read it.

Mr. Flynn: Well, he has not qualified the witness as an expert.

Q. (By Mr. McAlister): How much experience have you had with bookkeeping, Mr. Wong, and accounting?

A. I studied bookkeeping when I was in school. I never did any work actually.

Q. That is the American School you studied in?

A. Yes, sir. [123]

(Testimony of Kenneth Q. N. Wong.)

Q. And you worked at it?

A. And I also worked in the Physical Demonstration Building.

Q. How much of that nine years in China did you spend working at bookkeeping and checking books and records?

A. Well, we just checked the books against the invoices, that is all.

Q. Did you become familiar with the system while you were doing that? A. Oh, yes.

Q. Have you checked in the United States any bookkeeping in which Chinese characters were used?

A. These kind of books, you mean?

Q. Yes. A. No, this is the first one.

Q. That is right, you just got back from the Navy this past Spring, is that right? At any rate, November, 1939, balance is the last shown in there as far as the Chinese Chamber of Commerce is concerned? A. Yes, \$838.40.

Q. There is nothing in these books to show where the moneys might be, or anything like that?

A. No, sir.

Mr. McAlister: Do you want to ask any questions on any one of them? [124]

Mr. Flynn: Oh, you mean on each individual? If the Court please, we will accept the figure of \$838.40 and ask that our pleadings be amended accordingly, as far as the Chinese Chamber of Commerce is concerned.

The Court: All right.

(Testimony of Kenneth Q. N. Wong.)

Mr. Flynn: We will pick up \$38.40 on that, and we will drop some later, if the Court please.

Mr. McAlister: Let's see, we don't have the book for the Wing Mae School.

The Witness: Oh, yes.

Mr. McAlister: Wing Mae School, we have it?

A. Yes, we found it.

Mr. Flynn: That is Exhibit C, yes.

Q. (By Mr. McAlister): You have checked those figures, have you? A. Yes, sir.

Q. When does it show that account was started and when was the last entry?

A. Well, according to this, it started with 1936, in February.

Q. And the last entry was made when?

A. The last date is 1943, April 27th, the last date.

Q. Those three pages constitute the account of the Wing Mae School? A. Yes, sir.

Q. And that shows a balance to the credit of the [125] School in the amount of \$1914, is that right? A. \$1914.

Q. That is as of April 28th, 1944?

Mr. Flynn: 1944?

Mr. McAlister: I think that was the date of the last——

A. Yes, that is the last date here.

Q. Is that going to the account in any great detail, or does it just show the general sums, Mr. Wong?

(Testimony of Kenneth Q. N. Wong.)

A. Well, it shows donations and then the remittance to China and the expense of sending the remittance to China.

Q. It does not show where those donations are from? A. No, just total donations.

Q. It does not show where the money is located? A. No, sir.

Q. Is there anything on there, any signature anywhere of Kok Si's any place?

A. No, sir; I don't see it.

Q. Now, let's see, you have the records there of the Chinese Relief—

Mr. Flynn: May I ask a question of the witness on that before you put that book away?

Mr. McAlister: Yes.

Q. (By Mr. Flynn): Your last entries there, I believe, you said, was April 27th, 1943, is that correct? [126] A. Yes; that is the date.

Q. It is \$1914.40?

A. Well, at that date. It does not make that the balance, but that is the last date shown.

Q. What is the last balance shown on the last entry? A. A balance of \$1914.

Q. Even? A. Yes, sir.

Q. Is there also a notation in that book there to the effect that in April \$1914 had been sent to New York for transmittal to China and had been returned?

A. No., that is not the amount. \$1940 is the balance.

Q. The balance? A. Yes, sir.

(Testimony of Kenneth Q. N. Wong.)

Q. Was there any notation there showing that money just previous to that had been sent to New York for transmittal to China and had been returned? A. Yes, sir.

Q. How much? A. \$850.

Q. On what date does it show?

A. That was April 28th, 1944, and here is the notation here, that the bank in New York returned this last remittance because of transportation difficulties.

Mr. Flynn: If the Court please, we will accept that figure of \$1914 and ask that our pleadings in respect [127] to the Wing Mae School be amended accordingly.

The Court: All right.

Q. (By Mr. McAlister): Do you have the books of the Chinese War Relief Association, Exhibit E or D? When does that show that the account was started, Mr. Wong?

A. Well, the first statement in this account book, 1938, July.

Q. And that goes on down through until what is your last entry in there?

A. The last date I see in this book is the month of October, 1945.

Q. And you have some additional sheets there that shows some collections after that, is that right?

A. Yes, sir.

Q. And have you totaled all of those figures?

A. Well, I think I totaled them after making the translation.

(Testimony of Kenneth Q. N. Wong.)

Q. Yes, that is what I mean, and according to the way those records stand now, there was a balance there, according to your figure, of \$13,701.41, is that correct? A. Yes, sir.

Q. Now, you have gone over these books from July, 1938, until the last entry, have you, pretty carefully, checking each—does it show entries for every year during that time? [128]

A. No, they are quite jumbled up. If I recall, I think there is a year or two missing in this—1939, and then jumped up to 1942.

Q. There was no entries during those years of 1940 and '41—

A. I beg pardon, here is '40 here. There is no '41 in there, and then it is up to 1942.

Mr. Flynn: He was in Leavenworth then.

Mr. McAlister: He was somewhere. In checking through there on the remittances that were made, Mr. Wong, do you find a considerable number of items for local expense and entertainment of local Chinese and Cadets, or something like that? Do you want this (handing document to the witness)? In July of 1944, it showed an item of \$420 for a banquet at the Peking Restaurant?

A. Yes, sir.

Q. That was a banquet in September or August of 1944, \$500. That does not show who to. You checked those last sheets for expenditures, did you?

A. Yes, sir.

(Testimony of Kenneth Q. N. Wong.)

Q. Is there any item in there showing any expenditure for a banquet in October, 1945?

A. October, 1945? I don't see any.

Q. There is no entry showing that?

A. No. [129]

Q. Is there any way you could tell after examining these books, Mr. Wong, how regularly they were kept, or not, except for that period, of course, that he was away for three years? I only want to know if you know.

A. The dates are jumbled up a bit, so I straightened it out to strike that balance when I went to El Paso.

Q. That is, some of the dates are out of order?

A. Yes, sir.

Q. Were the entries more voluminous with more detail for some periods than they were for others?

A. Some of them were.

Q. Do all of the entries appear to be made in the same handwriting, as far as you know or can tell, or can you tell in Chinese handwriting?

A. Well, I am not so good in handwriting.

Mr. McAlister: That is all.

Cross-Examination

By Mr. Flynn:

Q. Mr. Wong, the last entry with reference to the Chinese War Relief Association that you found, and thereafter computing the amounts on the separate sheets and subtracting the expenditures donated on the different sheets, you arrived at the figure of \$13,701.41? A. I think so.

(Testimony of Kenneth Q. N. Wong.)

Mr. Flynn: Well, if the Court please, we will accept [130] that figure of \$13,701.41, and ask that our pleadings be amended with reference to the Chinese War Relief Association accordingly.

The Court: Very well.

Q. (By Mr. Flynn): Now, you have no books there which reflect the status of the account in the Chinese School in Phoenix, do you, Mr. Wong?

A. At that time, no.

Mr. Flynn: That is all.

Mr. McAlister: That is all.

(The witness was excused.)

Mr. Flynn: If the Court please, this morning our witness testified that out of this \$1900 belonging to the Sun Kwung Tong Company which he testified was in the possession of Kok Si at the time of the arrest, or until the arrest, that approximately \$400 of that was Kok Si's money for shares of stock which were issued to him and which he subsequently purchased, if my memory serves me correctly, and, consequently, I would like to ask that the Sun Kwung Tong Company's pleadings be amended to substitute the figure of \$1500 for \$1900, which would subtract \$400, and which the testimony shows to be Kok Si's interest in the corporation or association, and ask that the pleadings be amended accordingly. Your Honor please, may I have two minutes? I think we will stipulate and save a little time. I want to talk [131] to one of the witnesses.

Mr. McAlister: Counsel will stipulate that the

amount of \$2000, which was the cost of the banquet held on October 10th, 1945, was not shown on the records, and that it was paid from the Chinese War Relief fund, which would reduce the balance by that \$2000 from \$13,000; that is the balance shown on the records.

Mr. Flynn: That would reduce that Chinese War Relief Association to \$11,701.41. I have conferred, if the Court please, with Mr. Singh. I believe that is correct, that the \$2000 banquet was to be paid for out of the Chinese War Relief Association, and though the evidence indicates that the check was drawn on the Sun Kwung Tong Company, why, I am informed that, perhaps, that was the Chinese War Relief Association's money.

(Thereupon a discussion was had off the record.)

Mr. McAlister: Mr. Brewer.

BENNETT Y. BREWER

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. McAlister:

Q. Will you state your full name, please?

A. Bennett Y. Brewer.

Q. Where are you employed? [132]

A. I am employed as Special Agent for the Intelligence Unit, Treasury Department.

Q. How long have you been with that Department?

A. Since December 30th, 1945.

(Testimony of Bennett Y. Brewer.)

Q. Previous to that time were you working in the Collector's office here? A. Yes.

Q. Did you have occasion to compute the assessment of income taxes for Ung Kok Si for the years 1943 and 1944, I believe? A. I did.

Q. After computing that, from information that was available to you, did you determine the total amount of taxes?

Mr. Flynn: Now, just a minute. If the Court please, I don't think that portion of the testimony is admissible in this case. The only issue, as I see it here, is the question of whether or not this money belonged to Kok Si or whether or not he was holding it as Treasurer or Trustee, or what fiduciary capacity he was holding it for, for these other organizations. What happened to the money after it was seized was assumed entirely by the Internal Revenue Department that the money belonged to Kok Si and, consequently, I suppose they took it for income tax purposes, and whatever taxes that may have been assessed against him, [133] that has no bearing on the issues in this case, because if the money was not his—I mean if it was his, it makes no difference what happened to it. If the money was not his, then they had no right to take it, consequently, whatever the Internal Revenue Department did is another question. We are not concerned in that in this lawsuit; the question as to his income taxes, whatever the assessments or penalties they charge against him by virtue of his failure to file for previous years, and income, all of those matters

(Testimony of Bennett Y. Brewer.)

are extraneous to this matter, and it certainly de-
horts to this matter. The only issue, as I say, is the
question of whether or not this money belonged to
Kok Si when it was taken. If it didn't belong to
Kok Si, it was an unlawful seizure and amounts to
conversion. I think the evidence is adequate before
the Court to show that this money was turned over
to Kok Si by these different organizations.

(Thereupon argument between Court and
counsel.)

The Court: You can argue this later. You are
talking about him encumbering the record.

Mr. Flynn: That is all a part of the case, if
the Court please.

Mr. McAlister: I agree with Mr. Flynn, that
issue on the amount of tax is not material, but I
just want to put him on to show the reason we are
holding this.

The Court: He can testify to that and let it
go at [134] that.

Mr. McAlister: In other words, those funds are
being held by the Collector under the presumption
that they were moneys belonging to Kok Si and
they were seized to take care of the income tax de-
linquencies, is that correct? A. That is right.

Mr. Flynn: If that is the case, why—no
questions.

Mr. McAlister: That is all.

(The witness was excused.)

Mr. McAlister: I believe that is all the testimony we have.

Mr. Flynn: We have nothing further, if the Court please.

The Court: Do you have any rebuttal?

Mr. Flynn: No rebuttal.

The Court: All right. What do you want to do, submit a memorandum on this?

Mr. McAlister: Now that the facts are out, maybe we can find some detailed law on it. I know I can find some general law on it.

The Court: All right, what time do you want?

Mr. Flynn: Well, I'd like ten days if the Court thinks a memorandum is necessary. I'd like ten days to submit a brief or memorandum in support of our [135] position.

The Court: All right, do you want ten to reply?

Mr. Flynn: About ten, ten and five.

Mr. McAlister: I think that will be all right, although I have to be in San Francisco.

The Court: You will probably be up asking for an extension. I will take judicial notice of that now.

Mr. McAlister: Okay.

(Thereupon the trial was ended at 3:30 o'clock, p.m.) [136]

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 136 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Official Reporter.

In the United States District Court
for the District of Arizona

No. Phoenix 804

In the Matter of

HENRY ONG, President of Sun Kwung Tong Company, HENRY GONG, President of Chinese Chamber of Commerce of Phoenix, Arizona, FRANK ONG, Chairman of Wing Mae School in China, YEUN LUNG, Chairman of Chinese School, FRED WONG, Chairman of China War Relief Association, GEE SOOT HONG, YEE WO & COMPANY, TOM NOM, and FONG W. YUEY.

DEPOSITION OF UNG TOO THET,
ALIAS ONG KOK SI

Appearances:

For the United States Government: Mr. Charles McAlister, Assistant United States Attorney.

For the Petitioners: Messrs. Jerman & Flynn.

Phoenix, Arizona, February 26, 1946

Be It Remembered that pursuant to the annexed Order for Taking Deposition, the deposition of Ung Too Thet, alias Ong Kok Si, was taken before Louis L. Billar, a Notary Public in and for the County of Maricopa, State of Arizona, in the Petty Jury room of the United States Court House, commencing at the hour of two-thirty o'clock, p.m., on the 26th day of February, 1946.

The petitioners were represented by Messrs. Jer-
man & Flynn.

The United States Government was represented
by Charles McAllister, Assistant United States At-
torney.

The following proceedings were had:

Mr. Flynn: The record may show that this depo-
sition is taken pursuant to the Rules of Civil Pro-
cedure, Rule 27. It is a deposition taken prior to
the filing of an action in Cause No. Civil 804 Pho-
enix, taken pursuant to the petition to take the
deposition, and the order signed pursuant to the
said petition by the Honorable David W. Ling,
Judge of the United States District Court in and
for the District of Arizona, on the 25th day of
February, 1946; that notice to take the said depo-
sition was duly served upon counsel for the United
States Government, being Frank E. Flynn, United
States Attorney, and Charles E. McAllister, Assist-
ant United States Attorney. Do you have any fur-
ther comments?

Mr. McAllister: No, except I appear for either
the Government or the Collector of Internal Reve-
nue, or both, depending on which official of the
Government may desire representation.

Mr. Flynn: I think the record may show, then,
that it is understood that an application was filed
on behalf of the clients for whom we represent at
this time to file an action wherein the United States
Government will be a party defendant. The appli-

cation was forwarded to the United States District Attorney in and for the District of Arizona, and it is my understanding such application was sent to the Honorable Tom Clark, the Attorney General of the United States Government, with request for leave to sue the United States Government, which was rejected upon the ground that the Attorney General did not have authority under the law to authorize the filing of said suit, and that this deposition will be taken for the purpose of use in an action to be filed against the Collector of Internal Revenue, Mr. W. P. Stuart, or such other Internal Revenue Agents, and Narcotic Agents, as can be determined to be later necessary parties defendant, and that the United States Attorney appears on behalf of such defendants at this time; right?

Mr. McAllister: That is correct.

Mr. Flynn: The firm of Jerman & Flynn appear in the deposition on behalf of the petitioners who will, in so far as we are able to ascertain at this time, be parties defendant in the action to be filed.

Thereupon Walter Ong was sworn by the deposition Notary to act as Chinese interpreter.

UNG 'TOO THET', alias ONG KOK SI was thereupon duly sworn on behalf of the petitioners, and testified as follows:

Mr. Flynn: Is there any objection to the form of the oath to the deponent?

Mr. McAllister: To the witness? No, I do not.

Mr. Flynn: The reason I asked you that, Charlie, it is my understanding that in this deposition any irregularities which may occur in the taking of the deposition is waived. If you should like to determine whether or not he understands the nature of the oath taken——

Mr. McAllister: Well, you might, just to make the record clear, you might ask him if he feels he is bound by an oath like that which you gave him. Will you ask him that, Walter, if he feels that he is bound by that oath that he just took, to tell the truth and nothing but the truth in this matter.

(The question was interpreted by the Interpreter.)

A. Yes.

Mr. McAllister: He does?

The Interpreter: That he will tell the truth.

Direct Examination

By Mr. Flynn:

Q. Will you state your name?

A. Ung Too Thet.

Q. Do you have any other names or name that you go by? A. Ong Kok Si.

Q. How do you spell that?

A. O-n-g K-o-k S-i (spelling).

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. Where do you live, Kok Si?

A. (The Interpreter): He understands where he lived back in China. That is not what you want?

Mr. Flynn: No, where does he live in the United States?

A. East Madison, 113 East Madison, Sun Kwung Tong Company.

Q. And is that located at 113 East Madison Street, Phoenix, Arizona? A. Yes.

Q. Were you living there on the 11th day of October, 1945? A. Yes.

Q. What, if anything, happened on that day?

A. Some officers were there and took some money away from me.

Q. Were you arrested on that day by the officers?

A. Yes, they came to the store and arrested me.

Q. Where did they take you?

A. They took me to the police office.

Q. Do you know the names of any of those officers that arrested you? A. No, I don't.

Q. As far as you know, they are agents of the United States Government?

A. I just knew they were officers. I don't know where they were from.

Q. I will ask you—were you charged with the violation of the Harrison Narcotic Act and the Import and Export Drug Act?

A. I don't know what I was charged for.

Q. Did you plead guilty to a violation of the Narcotic Act? A. Yes.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. And you were sentenced by the Court to spend five years in the penitentiary, at such penitentiary as may be designated by the Attorney General, and that sentence was suspended under condition that you leave the United States within 30 days from the 28th of January, 1946?

A. Yes.

Q. And you have made arrangements to secure passage to China? A. Yes.

Q. When do you expect to leave?

A. As soon as there is a boat available.

Q. From the information you now have, that will be within the next week or so?

A. It is very close. I don't know exactly when the time is, but it is any minute.

Q. Directing your attention to the 11th day of October, 1945, when the arrest was made, now, at the premises of 113 East Madison Street, did you have a safe? A. Yes.

Q. And at the time the arresting officers arrested you, did they take certain money out of that safe?

A. Yes.

Q. Now, at the time that arrest was made and the money was taken, did you have \$1900 belonging to the Sun Kwung Tong Company in your possession? A. Yes, it was in the safe.

Q. How did you get possession of that money, Kok Si?

A. It was put in trust with me, by the different parties that belonged to the Sun Kwung Tong Company.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. Did you have any personal interest in that money other than the safekeeping of it?

A. I never used that money at all. It was just put there in my trust.

Q. And you were holding the money for whom?

A. For the Sun Kwung Tong Company.

Q. Is the Sun Kwung Tong Company an Arizona corporation? A. Yes.

Q. Who composes the Sun Kwung Tong Company, Chinese merchants?

A. Yes, they are all Chinese.

Q. Do you have any books, or did you make any book entries when you got this money showing who it belonged to, the \$1900 I am talking about now?

A. Yes, the books appear.

Q. Do you have those books available?

A. Yes, the books are here.

Q. Can you get the books and show us the entries that were made as to when this \$1900 belonging to the Sun Kwung Tong Company was given to you?

(The books were presented.)

Q. (By Mr. Flynn): That reflects the fact that you were holding \$1900 for the Sun Kwung Tong Company, does it not?

A. Yes, because the names are right on there too.

Q. That \$1900 was in the safe on the night the arrest was made? A. Yes.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. And was that \$1900 taken by the arresting officers?

A. It was in the safe, so they took it.

Q. Do you know where that \$1900 is now?

A. No, I don't know where it is. They took it, that is all I know.

Q. Have you ever gotten it back, or any part of it? A. No.

Q. On the 11th day of October, 1945, the day the arrest was made, were you holding some money for the Chinese Chamber of Commerce of Phoenix, Arizona? A. Yes.

Q. Do you know how much that was?

A. About Thirteen or Fourteen Thousand Dollars.

Q. No, I am talking about the Chinese Chamber of Commerce.

A. Chinese Chamber of Commerce, approximately Eight to Nine Hundred Dollars.

Q. Where was that money when the arrest was made? A. It was in the safe also.

Q. What happened to that money?

A. The officers came in and took it.

Q. Did that money belong to you?

A. It belonged to the Chinese Chamber of Commerce. It was put in my trust.

Q. Do you know where that money is now?

A. The same people took it away. I don't know where it is now.

Q. Now, on the night that this arrest was made, did you have Cashier's Check No. 130459, dated

(Deposition of Ung Too Thet, alias Ong Kok Si.)
August 7th, 1945, in the sum of \$2500, drawn on the Bank of Kantong, San Francisco, California, payable to the order of Ong Kok Si, and signed by Gee Soot Hong?

A. Yes, they took a check given—put in my trust to purchase property on Second Street and Jefferson.

Q. Was that check in the safe the night that the arrest was made? A. Yes.

Q. And did the arresting officers take that check? A. Yes.

Q. Do you know where that check is now?

A. No, I don't know where it is. The same parties took that check also.

Q. Did you have any interest in the check, or any of the money belong to you?

A. No, I have no interest in the check. It was just given to me to apply on the purchase of a piece of property.

Q. On the night the arrest was made, did you have also a Cashier's check dated August 22nd, 1945, No. 500, in the sum of \$2500, drawn on the Kantong Bank, at San Francisco, California, payable to the order of the Sun Kwung Tong Company and signed by Yee Wo and Company, and Tom Nom, and Fong W. Yuey?

A. Yes, there was a check.

Q. Where was that check the night the arrest was made? A. In the safe.

Q. And what happened to that check?

A. The check—there was a letter also enclosed in the check in reference to that.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. Do you know where that check is now?

A. The same parties took it.

Q. Did any of that money belong to you?

A. No, it was just put in my trust.

Q. What were you holding it in trust for?

A. To purchase a piece of property on Second Street and Jefferson.

Q. Now, on the night the arrest was made, did you have \$1900 in the safe belonging to the Wing Mae School in China? A. Yes.

Q. Where did you get that money?

A. That money was put in my trust by parties responsible that went out to collect the money from different Chinese individuals.

Q. What was that money to be used for?

A. That money was to support a Chinese School back in China.

Q. Who delivered that money to you?

A. Frank Ong.

Q. On the night the arrest was made, did you also have \$1500 in your possession belonging to the Chinese School of Phoenix? A. Yes.

Q. Who delivered that money to you?

A. Yeun Lung.

Q. Is he the Chairman of the Chinese School in Phoenix, Arizona? A. Yes.

Q. Did you own or have any interest in that money?

A. No, it was just for the support of that school.

Q. And that was left with you for safekeeping?

A. Yes, it was.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. Was that money in the safe the night the officers arrested you? A. Yes.

Q. Did they take that money? A. Yes.

Q. Do you know where that money is now?

A. The same parties took it. I don't know where it is now.

Q. Now, on the night the arrest was made, the 11th of October, 1945, did you have approximately \$14,000 in money belonging to the Chinese War Relief Association of Arizona in a safe?

A. Yes.

Q. What happened to that \$14,000?

A. The same parties took it.

Q. Do you know where that money is now?

A. I don't know where it is now.

Q. Other than it was for safekeeping purposes, did you have any interest in that money?

A. It was just put in my trust. It was not my money.

Q. Who gave you the money?

A. It was turned in at various times by Mr. Fred Wong, who is Chairman of the Chinese Relief Association. He turned in the biggest part of it.

Q. Go back now—ask him if he can remember who turned in the money to him on the \$1900 of the Sun Kwung Tong Company he has testified to?

A. Henry Ong collected some from those various parties and turned it over to me.

Q. That is, the \$1900 of the Sun Kwung Tong Company money? A. Yes.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. And ask him if he can remember who turned over the \$800 belonging to the Chinese Chamber of Commerce of Phoenix, Arizona, to him?

A. Mr. Henry Gong.

Q. Is he the President of the Chinese Chamber of Commerce of Phoenix?

A. Yes, he was President at that time.

Q. Do your books reflect the \$800 belonging to the Chinese Chamber of Commerce of Phoenix, Arizona? In other words, do you have a bookkeeping entry showing you were holding that money for them?

Mr. McAllister: Just a second now.

A. Yes, he says it is kind of a small book there (indicating a number of books).

Mr. McAllister: Just a second. I don't like to object to it, but I think we ought to have a little voir dire to see how those books were kept and who kept them.

Q. (By Mr. Flynn): In the operation of this, or rather, the handling of these accounts that you have testified to, did you have a set of books?

A. Yes. All the books are here.

Q. Will you show us the entry where you received \$1900 for the Sun Kwung Tong Company?

A. It is the largest book in the bunch; has a blue binding to it.

Q. Ask him to point out the entry in it showing he got \$1900 from the Sun Kwung Tong Company.

A. It is right in the front page of the book.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Mr. McAllister: Let me ask him a few questions on voir dire.

Mr. Flynn: Very well.

Q. (By Mr. McAllister): Who kept these records? A. I did.

Q. You, personally, made those entries yourself?

A. Yes.

Q. What do these books represent now; does that represent the records of the Sun Kwung Tong Company or your personal records, or what do they represent?

A. It represents the Sun Kwung Tong Company's records.

Q. Were you a member of the Association?

A. Yes.

Q. What position, if any, did you have in it?

A. I was its manager there.

Q. As manager, were you required to keep the records? A. Yes.

Q. You made these records regularly in the course of business? A. Yes.

Q. Were you also Treasurer of the Company as well as Manager? A. Yes.

Q. They turned the funds of that Company over to you as Treasurer? A. Yes.

Q. Does that book represent all of the records of the Company?

A. No, these are not the complete records of the Sun Kwung Tong Company.

Q. What does that page represent there?

A. These are the names of the persons that have a share in the Company.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. That is? A. Yes.

Mr. Flynn: Maybe I can clear that up.

Mr. McAllister: All right, go ahead.

Q. (By Mr. Flynn): Kok Si, can you point out the book entry showing where you received \$1900 belonging to the Sun Kwung Tong Company? I want you to point it out so we can have it marked.

(The witness indicates in the book.)

Q. The page you are referring to in this book bears an entry showing you were holding as Treasurer for the Sun Kwung Tong Company \$1900, is that correct? A. Yes.

Mr. McAllister: And can we have that marked as Exhibit A, as your Exhibit A for identification?

Mr. Flynn: Yes.

(Thereupon the page was marked as Petitioners' Exhibit A for identification.)

Q. (By Mr. Flynn): Now, will you get the book entry showing an entry of \$800, belonging to the Chinese Chamber of Commerce, of Phoenix, Arizona?

(The witness complies.)

Mr. Flynn: May we have that marked as Petitioners' Exhibit B? Is that the entry on the back of the book there; is this the entry (indicating)?

A. No, that is just the names.

Q. Where is the page showing this \$800 for the Chinese Chamber of Commerce; is that the entry (indicating on page)? A. Yes.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Mr. Flynn: May we have that marked as Petitioners' Exhibit B for identification?

Mr. McAllister: I object to it for the time being. You can go ahead, put it in over my objection.

Q. (By Mr. Flynn): Did you make that entry, Kok Si? A. Yes.

Q. That entry was made when you received the money? A. Yes.

Mr. Flynn: The record may show that the objections are saved until at the time of the trial.

(The page was marked as Petitioners' Exhibit B for identification.)

Q. (By Mr. Flynn): Do you have any bookkeeping entry showing the receipt of \$2500 Cashier's check from Gee Soot Hong?

A. I don't have no record. The only thing I had was the check.

Q. Is that true of the check of Yee Wo and Company, Tom Nom and Fong W. Yuey?

A. All I had was the check.

Q. Can you show us the bookkeeping entry where you were holding \$1900 for the Wing Mae School in China?

(The witness complies.)

Q. Is this the entry that you made (indicating)?

A. Yes.

Q. That reflects that you are holding \$1900 for the Wing Mae School in China? A. Yes.

Q. And did you make that entry? A. Yes.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Mr. Flynn: May we have that marked as Petitioners' Exhibit C for identification?

(The page was marked as Petitioners' Exhibit C for identification.)

Mr. Flynn: Do you have a bookkeeping entry showing a \$1500 account of the Chinese School at Phoenix, Arizona?

A. I am not sure whether it is here or not. I will take a look.

Mr. Flynn: Tell him to go ahead and see if he can find it.

(The witness complies.)

A. I have one book here, but there is still another book at Yeun Lung's place that has entries of money put in by different parties to start that school.

Mr. Flynn: Would it be agreeable to you to get that and have the proper entry marked as a Petitioners' Exhibit?

Mr. McAllister: Who kept that record?

Q. (By Mr. Flynn): Who kept that record which you say is at Yeun Lung's place?

A. Those records were kept by the school teacher. The school teacher passed away and Yeun Lung, being the principal, he took the books, but the money was always in my possession.

Q. And the book reflects a \$1500 entry?

A. Yes.

Q. And who made the entry in the book?

A. I think the school teacher entered those.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. He didn't make that himself?

A. No, I didn't.

Q. Now, do you have any books of the Chinese War Relief Association showing that you had \$14,000 in your possession the night you was arrested? A. Yes, they are here.

Q. Will you get those books, please?

A. Yes, here they are. These small books are just donations, shows donations from the Victory Parade.

Q. Do you have any bookkeeping entry showing the receipts of this \$14,000 for the Chinese War Relief Association?

A. Yes, they are all here.

Q. Which ones are they?

A. The biggest part of it in here, and then the most recent money I received are on these sheets of paper.

Q. Did you make these entries on these pieces of paper? A. Yes.

Q. And what do they show?

A. They show the money turned over to me on these different occasions that there was money collected, like, for instance, Double Ten, and from the Relief cans, China War Relief cans, Victory Parade, and also July 4th. The name of that donation was Seven-seven. That was something signifying when China went to war with Japan, and they call it "Seven-seven." All the money was taken in.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. These are receipts showing the amount of money? A. Yes.

Mr. Flynn: May we have those marked?

(Five pages were marked as Petitioners' Exhibits D for identification.)

Mr. Flynn: What does this exhibit, I mean, what does this entry reflect?

A. The entries in this book show the money I received and some money that I paid out.

Q. Do they have anything to do with the Chinese War Relief Association?

A. This is the Chinese War Relief Association book.

Q. Did you transpose the money you received from those individual sheets into a ledger book of any kind?

A. The sheets here have not been entered in this main book yet.

Q. Does it have any entries showing the receipts for the Chinese War Relief Association in this book?

A. Yes, these are all the entries of the Chinese War Relief.

Q. That is just this one page?

A. All of it.

Q. The whole book? A. The whole book.

Mr. Flynn: May we have it marked as Petitioners' Exhibit E for identification?

(The book was marked as Petitioners' Exhibit E for identification.)

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Mr. Flynn: These entries in Petitioners' Exhibit D were made by you, Kok Si? A. Yes.

Q. And the entries made on Petitioners' Exhibit E were made by you, were they not?

A. Yes.

Q. Now, were the books and the entries that you have testified to for the money that you were holding for the Sun Kwung Tong Company, the Chinese Chamber of Commerce. Gee Soot Hong, Yee Wo and Company. Tom Nom, Fony W. Yuey, Wing Mae School in China, the Chinese School of Phoenix, and the Chinese War Relief Association, were they all made in these books prior to October 11th, the day you were arrested? A. Yes.

Q. And they reflect the status of each account on the date of your arrest? A. Yes.

Q. Now, these books were taken by the arresting officers, were they not?

A. The day later the officers came and took the books.

Q. Was there any change made in any of the entries with reference to any of the accounts you have testified about here before they were taken?

A. There was no changes made.

Q. And how long were the books kept by the officers?

A. They kept them up until recently.

Q. And you secured them, did you not, through your attorney, George Wilson? A. Yes.

Q. Are you having them audited at the present time? A. Yes.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. What are these entries, Kok Si (showing document to witness)?

A. These are the books showing the donations from the different Chinese parties from different parts of Phoenix.

Q. To the Chinese Relief Association?

A. To the Chinese Relief Association

Mr. Flynn: May we have this marked as Petitioners' Exhibit F for identification?

(The document was marked as Petitioners' Exhibit F for identification.)

A. And they are only for the Victory Parade.

Q. (By Mr. Flynn): Did you make these entries noted on Petitioners' Exhibit F for identification?

A. These were not entered by me. These were entered by the different parties responsible for that certain group.

Q. In other words, the persons that collected the money from the different groups turned this over to you when they turned the money over to you?

A. That is right.

Mr. Flynn: I believe that is all, I think, Charlie.

Cross-Examination

By Mr. McAllister:

Q. How long have you lived in Phoenix?

A. Approximately 23 years.

Q. When was the Sun Kwung Tong Company organized?

A. June, 1924.

Q. And you have been one of the associates all that time?

A. Yes.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. Where was its office?

A. The Sun Kwung Tong Company? 113 East Madison.

Q. Have you lived there all the time you have been in Phoenix? A. Yes.

Q. How long have you been a member of the Chinese Chamber of Commerce?

A. Ever since—I have been a member of the Chinese Chamber of Commerce ever since its existence.

Q. Do you know where it was organized?

A. No, I don't. It might show in the books.

Q. Have you been an officer in the Chamber of Commerce? A. Yes.

Q. Have you always kept its records?

A. Yes.

Q. What about the Chinese Relief Association, when was it organized?

A. It was organized approximately around '37 or '38.

Q. And Arizona, or Phoenix, was its headquarters at 113 East Madison Street?

A. Are you talking about the Chinese War Relief Association? A. Yes.

A. Whenever there is a meeting to be held it was at the Chinese School.

Q. That is the school that is at Phoenix, is it?

A. Yes.

Q. Where is that located?

A. On South Second Street.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. Did that operate during the last year, the school, that is?

A. It is still there. We still pay rent but we don't have any students or teachers.

Q. Are you an officer in the Relief Association too? A. Yes.

Q. What about this Wing Mae School in China; what kind of a school is it?

A. The Wing Mae School in China is a school supported by the Chinese in foreign countries. They donate money to be sent back to help support the school.

Q. Where is it located?

A. Canton, Hoy Ping.

Q. Did you have an organization here which collected funds for that? A. Yes.

Q. Did you have your own business located at 113 East Madison Street too?

A. Yes, the Sun Kwung Tong Company, which I had a share.

Q. That was your principal business here, was it? A. Yes.

Q. What was the nature of that company's business?

A. Selling and buying Chinese merchandise when it was available.

Q. It was made up of yourself and a number of other local Chinese merchants? A. Yes.

Q. Well, how did it operate? That is, if you sold merchandise did you report back to the other partners, or what?

(Deposition of Ung Too Thet, alias Ong Kok Si.)

A. I kept records and showed them the records whenever they wanted to see them, whenever it was the proper time to show them.

Q. Did you handle any of the merchandise or the orders for the merchandise? A. Yes.

Q. How was it formed originally? Each person donate and contribute so much money and formed a pool, or something?

A. Everybody put up so much and formed something like a pool.

Q. This safe that you mentioned, that was in your office, was it? A. Yes.

Q. Where was that, in the basement or upstairs at 113 East Madison?

A. It was on the main floor.

Q. Do you recall whether it was open on the night of October 11th, I believe it was, when the officers came down there? A. Yes.

Q. And all of these funds that you mentioned and those checks were in that safe? A. Yes.

Q. How did you have them in there; that is, was the money in one spot and the bonds, or I mean the checks, in something else, or what?

A. It was all in the safe.

Q. Loose in the safe?

A. Yes, it was all loose in the safe.

Q. Was the currency bundled up, or anything?

A. Well, some was bunched up in hundreds and five hundreds, and some were loose.

Q. And those two checks that were mentioned from Gee Soot Hong and Yee Wo and Company;

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Tom Nom and Fong W. Yuey, were they in there with the rest of the money? A. Yes.

Q. Were your account books in there too?

A. No, the books were not in the safe.

Q. Did you ever keep any of your money in the bank? A. Yes.

Q. Did you have any of your money here in the safe that night?

A. Most of it belonged to different organizations. Might have a little bit. I don't know.

Q. Well, if you had some, how would it be in there, along with the other paper and silver money?

A. Most of the money belonged to the organizations. I don't know even if there was any money of mine or not.

Q. But did any of these organizations have a bank account? A. No.

Q. How long had you been keeping money in there for these various people?

A. I have been Treasurer of all of these organizations ever since their existence.

Q. When you got ready to turn the money over to one of the organizations, how would you do it?

A. I'd open the safe and hand them the money.

Q. You just got the first money you came to if it equaled the right amount?

A. I would just give them the first money I came to just so long as I gave them the right amount.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. You stated there was \$1900 belonging to this Sun Kwung Tong Association. How long did you have it in there?

A. It has been in my trust ever since we started the company.

Q. That was the money that was given—that is, each one put in so much money and that is the total amount, is that right? A. Yes.

Q. Did that company have any bank account?

A. Yes.

Q. Where was that?

A. At the Arizona Bank—the bank that is closest to Chinatown.

Q. That must be the Central Avenue bank, the First National Bank of Arizona. Was that the only one—is that the only account that the Company had?

A. There is an account at the Phoenix Bank also.

Q. That means the one on First Avenue?

A. Yes.

Q. Did you write checks on those accounts?

A. Yes.

Q. When was this approximately \$800 of the Chinese Chamber of Commerce money turned over to you?

A. It was turned over to me a long time ago. That was just the balance. The dues are paid in and turned over to me, and that was the balance of what was used.

Q. How long ago was that?

A. It shows in the book. I don't remember.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. Was it turned over to you all at once?

A. It was not turned all at once. It was a little at a time.

Q. And is that true of this other money from these other organizations that was turned in maybe a few hundred dollars now and maybe a little more later? A. Yes.

Q. How long had you been holding some of this money aside from that \$1900 which you said you had been holding since 1924?

A. I can't tell you the exact date of so many.

Q. Did a good many members of the Chinese community sort of consider you a banker for them?

Mr. Flynn: That is objected to. That calls for a conclusion.

Mr. McAllister: Let him answer it.

A. A lot of small stores that I cashed checks for and used me as a bank.

Q. (By Mr. McAllister): You used to cash checks there from the money in your safe all the time? A. Yes.

Q. These \$2500 checks from San Francisco. You stated those were to be used in buying some property? A. Yes.

Q. Who was going to buy the property?

A. Henry Ong.

Q. And who was going to handle the deal?

A. He said Henry Ong was the party that recommended it to Tom Nom and Gee Soot Hong were the parties that were supposed to make the transaction.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. That is, they were going to purchase the property. Were you interested in buying the property too? A. No.

Q. You weren't going in three ways on the partnership?

× A. It was going to be bought by the Suey Yung Association.

Q. Is that a local association?

A. Yes, it has a branch in San Francisco.

Q. Are you a member of that Association?

A. Yes. I am the Suey Yung Association's Treasurer. That is the reason the money was turned over to me.

Q. You were going to buy it for the Association and not for yourself; that is, the three of you weren't partners?

A. Yes, it was for the Association.

Q. Do you know how long the actual identical money that was in that safe had been in there?

A. I don't remember how long it has been in there, because I used that cash for cashing checks at various times.

Q. And you put other money of your own in there in place of it, is that right?

A. If I cashed the check, I cashed the check at the bank and replaced the money in there.

Q. You did have some money in there that was received for selling opium, didn't you?

A. No.

Q. Isn't it true that the officers found several thousand dollars worth of marked money scattered through there? A. No.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. You don't know whether they did or not?

A. No, I don't.

Q. Let's see, I believe there were some bonds found in this safe at the same time on the 13th of October, isn't that correct? A. Yes.

Q. Were those in your name or somebody else's?

A. Some in mine and some belonging to other parties.

Q. Were those returned to you or not?

A. Yes, they were returned.

Q. None of the bonds belonged to any of these associations or organizations?

A. No, they didn't belong to the different organizations or associations.

Q. You were just holding them there for either security or safekeeping?

A. They were just put in my possession for safekeeping.

Q. You didn't have any of them for security?

A. No, they were just for safekeeping.

Q. How about this Chinese Relief money, how often did you send it overseas?

A. Sometimes I held it for a little while and sometimes I didn't hold it very long. Recently, for the past few years, we were not able to send the money, so that is the reason I had it.

Q. Was this Association connected with the National Relief Association?

A. This is a part of the Relief Association, a branch of the Relief Association. The money was sent direct to Chungking.

(Deposition of Ung Too Thet, alias Ong Kok Si.)

Q. That is, each branch sends the money in; you don't know what the other branches did, none of these other organizations had a bank account?

A. No.

Q. It was the Sun Kwung Tong Company?

A. Yes.

Q. Do your records here show the records of the money in the bank of that Company?

A. It don't show it.

Q. You have been keeping these records personally ever since each one of the organizations started, is that correct? A. Yes.

Q. And when do you make the entries, the day you get the money or some time afterwards?

A. I very seldom entered it the very same day. I always waited until all of that had been turned over to me, and then I write it down.

Q. This reflects all of the financial records of all of these financial organizations, is that correct?

A. Yes.

Mr. McAllister: That is all I have.

Mr. Flynn: That is all.

(The witness was excused.)

Mr. Flynn: There is a possibility that the witness may be started out of the Continental limits of the United States prior to the production of the testimony taken in this deposition. In the event he is not present to affix his signature hereto, the same will be considered waived by both parties hereto, right?

Mr. McAllister: Okay.

The foregoing 36 typewritten pages, comprising my testimony, and any changes, if any, are noted in ink and the same is a true and correct transcript of my testimony.

Since I do not read English, the testimony was read and interpreted to me by Mr. Walter Ong, the individual who acted as the interpreter in the taking of this deposition.

UNG TOO THET
ONG KOK SI.

Signature of the Witness.

State of Arizona,
County of Maricopa—ss.

Be It Known that I took the foregoing deposition pursuant to the annexed Order for Taking Deposition; that I was then and there a Notary Public in and for the County of Maricopa, State of Arizona, and by virtue thereof, authorized to administer an oath; that the witness before testifying was duly sworn by me to testify to the truth, the whole truth and nothing but the truth; that the deposition was reduced to typewriting under my direction, and was carefully read to the witness before he signed the same.

Dated at Phoenix, Arizona, this, the 5th day of March, 1946.

[Seal] /s/ LOUIS L. BILLAR,
Notary Public.

My commission expires March 27, 1947.

[Title of District Court and Cause.]

ORDER FOR THE TAKING OF
A DEPOSITION

Upon reading the petition filed in the above-captioned matter and it appearing to the Court that the petitioners are entitled to the relief prayed for;

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that the petitioners be and they are hereby authorized to take the deposition of Ung Too Thet, alias Ong Kok Si, upon written interrogatories in the Grand Jury Room of the United States Court House, City of Phoenix, Arizona, on the 26th day of February, 1946.

It Is Further Ordered that the said deposition be taken in accordance with the Rules of Civil Procedure and before a person authorized by said Rules to take said deposition.

It Is Further Ordered that the said deposition shall cover the subject matter touching all facts of and concerning the allegations contained in the petition on file herein wherein the issuance of this Order is requested.

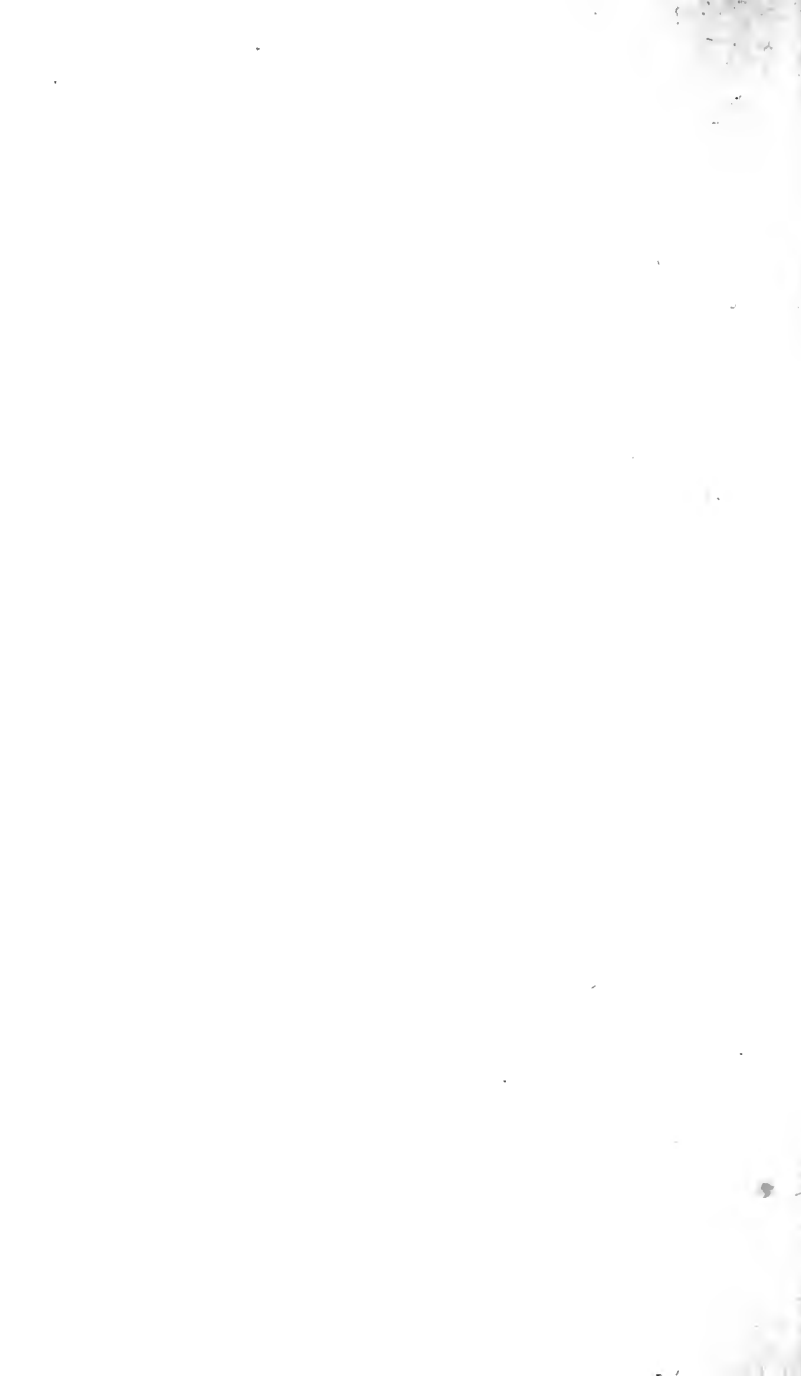
Done in open court this 25th day of February, 1946.

[Endorsed]: No. 11771. United States Circuit Court of Appeals for the Ninth Circuit. William P. Stuart, United States Collector of Internal Revenue in and for the State of Arizona, Appellant, vs. Henry Ong, President of Sun Kwung Tong Company, an association, Chinese Chamber of Commerce of Phoenix, a corporation, Frank Ong as Chairman of the Wing Mae School in China, an association, Yeun Lung, Chairman of the Chinese School of Phoenix, Arizona, an association, and Fred Wong, Chairman of the Chinese War Relief Association, an association, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed October 27, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM P. STUART, United States Collector of
Internal Revenue in and for the State of Arizona,
vs. Appellant,

HENRY ONG, President of Sun Kwung Tong
Company, an association; CHINESE CHAMBER
OF COMMERCE OF PHOENIX, a corporation;
FRANK ONG, as Chairman of the Wing Mae
School in China, an association; YUEN LUNG,
Chairman of the Chinese School of Phoenix, Ari-
zona, an association; and FRED WONG, Chair-
man of the Chinese War Relief Association, an
association, Appellees.

ON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT
OF ARIZONA

BRIEF FOR THE APPELLANT

THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,
GEORGE A. STINSON,
FRED J. NEULAND,
*Special Assistants to the
Attorney General.*

FRANK E. FLYNN,
United States Attorney.

CHARLES B. McALISTER,
Assistant United States Attorney.

FILED
JAN 23 1918
PAUL P. O'BRIEN,
CLERK



INDEX

	Page
Opinion below	1
Jurisdiction	1-3
Questions presented	3
Statute involved	3-4
Statement	5-7
Statement of points to be urged	8-9
Summary of argument	9-10
Argument:	
I. The District Court did not have jurisdiction to entertain the instant suit against the Collector	10-14
II. The judgment entered by the District Court was erroneous because it is impossible for the Collector to comply with its terms	14-16
III. The District Court had no jurisdiction to enter money judgments against the Collector	16-18
Conclusion	19

CITATIONS

CASES

	Pages
<i>Bladine v. Chicago Joint Stock Land Bank</i> , 63 F. 2d 317	12
<i>Elliott v. Swartwout</i> , 10 Pet. 137	15
<i>Hong, Gee Soot v. Stuart</i> , decided March 21, 1947	16
<i>Karno-Smith Co. v. Maloney</i> , 112 F. 2d 690	12
<i>Kirkendall v. United States</i> , 31 F. Supp. 766	16
<i>Long v. Rasmussen</i> , 281 Fed. 236	16
<i>Moore Ice Cream Co. v. Rose</i> , 289 U. S. 373	10, 11, 12
<i>Schwartz v. United States</i> , decided January 7, 1939	18
<i>Sheehan v. Hunter</i> , 133 F. 2d 303	16
<i>Tucker v. Alexander</i> , 275 U. S. 228	11
<i>United States v. Felt & Tarrant Co.</i> , 283 U. S. 269	11
<i>United States v. S. F. Scott & Sons</i> , 69 F. 2d 728	12
<i>White v. Hopkins</i> , 51 F. 2d 159	12

STATUTE

Pages

Internal Revenue Code:

Sec. 3641 (26 U. S. C. 1940 ed., Sec. 3641)	12
Sec. 3772 (26 U. S. C. 1940 ed., Sec. 3772)	
.....	2, 3, 4, 5, 8, 9, 10, 11, 12, 16
Sec. 3971 (26 U. S. C. 1940 ed., Sec. 3971) 4, 9, 15	

MISCELLANEOUS

Constitution of the United States, Art. I, Sec. 9	15
Treasury Regulations 111, Sec. 29.322-3	11, 15



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM P. STUART, United States Collector of
Internal Revenue in and for the State of Arizona,
Appellant,
vs.

HENRY ONG, President of Sun Kwung Tong
Company, an association; ¹ CHINESE CHAM-
BER OF COMMERCE OF PHOENIX, a cor-
poration; FRANK ONG, as Chairman of the
Wing Mae School in China, an association;
YEUN LUNG, Chairman of the Chinese School
of Phoenix, Arizona, an association; and FRED
WONG, Chairman of the Chinese War Relief
Association, an association. Appellees.

ON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT
OF ARIZONA

BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court did not file a written opinion.

JURISDICTION

This appeal involves a suit instituted against the
Collector of Internal Revenue on March 1, 1946 (R.20)

¹ Henry Ong, president of the Sun Kwung Tong Company, is not a party to this appeal, by reason of the order entered by the District Court (R.52) dismissing the fourth cause of action (R.15-16) with prejudice.

to recover the aggregate sum of \$20,100 alleged by appellees in five causes of action to represent trust funds belonging to them and taken from the possession of one Ung Too Thet, alias Ung Kok Si, a taxpayer, on or about October 11, 1945, at the time of his arrest by United States narcotic agents for violation of the Harrison Narcotic Act and the Import and Export Drug Act, and turned over to the Collector (R.11,13,14,15-16,17). Appellees claim that prior to October 11, 1945, the money had been delivered to the taxpayer, as treasurer of each respective association, to be held by him for and in their behalf; that the money was their property and not the property of the taxpayer, and that the taxpayer was holding the fund as trustee for each association. (R. 11,12,14,15,17.) Of the amount seized from the taxpayer, and turned over to the Collector, \$20,915.02 was applied against unpaid income tax assessments made against the taxpayer, and which amount was thereafter covered and deposited into the Treasury of the United States. (R.50-51.) Appellees claim that \$20,100 of the amount seized was wrongfully applied against the taxpayer's unpaid taxes; that at the time the suit was instituted the Collector was in possession of the \$20,100 belonging to them, and that although demand for its return was made, the Collector refused to deliver or return any part thereof to them. (R. 12,13,15,16,18.) No claims for refund for the recovery of the fund in controversy were filed by appellees as provided by Section 3772 of the Internal Revenue Code (R.51.) Appellees attempted to invoke jurisdiction of the District Court, presumably under the provisions of Section 24, Fifth, of the Judicial Code. A money judgment for \$17,453.81 in favor of appellees was originally entered on March 21, 1947. (R. 5, 41-43.) A motion for a new trial was filed by the Collector on March 31, 1947. (R. 5, 43-46.) On May 23, 1947, the District Court granted the motion for

new trial as to the fourth cause of action and denied it as to the remaining causes of action. (R. 5, 48.) On May 26, 1947, the Collector filed a motion to vacate and set aside the judgment and to dismiss the complaint for lack of jurisdiction (R. 6, 49-50), supported by an affidavit of the Collector (R. 50-51), and on the same date, the court below denied the motion and entered a final judgment (R. 52.) Notice of appeal was timely filed on August 7, 1947 (R. 53), pursuant to the provisions of Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction to entertain a suit against the Collector for the recovery of money belonging to appellees, which had been seized from the taxpayer and applied to unpaid taxes assessed against him, and thereafter deposited into the Treasury of the United States, where no claim for refund had theretofore been filed as required by Section 3772 of the Internal Revenue Code.

2. Whether the District Court had jurisdiction to enter a money judgment against the Collector under the circumstances involved here.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in

any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

* * *

(26 U.S.C. 1940 ed., Sec. 3772.)

SEC. 3971. DEPOSIT OF COLLECTIONS.

(a) *General Rule.*—Except as provided in subsection (b), the gross amount of all taxes and revenues received under the provisions of this title, and collections of whatever nature received or collected by authority of any internal revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary of the Treasury of the United States under instructions of the Secretary as internal revenue collections, by the officer receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the Treasurer, designated depository, or proper officer of a deposit bank, shall be transmitted to the Commissioner.

* * *

(26 U.S.C. 1940 ed., Sec. 3971.)

STATEMENT

On or about October 11, 1945, Ung Too Thet, alias Ung Kok Si, the taxpayer involved herein, was engaged in the illicit opium traffic at his place of business, 113 Madison Street, Phoenix, Arizona, at which time he was arrested by agents of the United States Narcotic Bureau. (R. 23, 135.) At the time of his arrest a search was made of his premises, resulting in the discovery of a large amount of opium, as well as a safe containing some \$32,000 in cash and checks which were seized as evidence by the narcotic agents (R. 23, 138-139, 146) and turned over to the Collector (R.139).

Theretofore, delinquent assessments had been duly and regularly made against the taxpayer for unpaid 1943 and 1944 income taxes in the total amount, including interest and penalties, of \$25,893.11. (R. 24, 51.) A narcotic tax of \$8,100 had likewise been made against the taxpayer, which was satisfied out of the moneys seized (R. 144), leaving a balance of cash in the sum of \$20,915.02, which amount was on or about October 30, 1945, duly and regularly applied against the unpaid income taxes of the taxpayer, and on the same date covered or deposited into a Treasury account. Since October 30, 1945, the money has been in the legal possession of the Treasury of the United States, and was not in the possession or control of the Collector. (R.51.) No claims for refund were filed by appellees for the recovery of the money in controversy as required by Section 3772 of the Internal Revenue Code. (R. 51.)

The basic and material facts as found by the District Court may be summarized as follows:

For a long time prior to October 11, 1945, the Chinese War Relief Association had been engaged in soliciting funds from organizations and individuals for the bene-

fit of homeless and destitute residents of China, as a result of which activities, the sum of \$11,701.41 had been collected. On or about October 11, 1945, the above money was delivered to the taxpayer, as treasurer of the association, at his place of business. (R. 37-38.) At the time of the arrest of the taxpayer, as hereinbefore described, the \$11,701.41 was seized by the narcotic agents and taken from the possession of the taxpayer, who had no title or interest therein, other than the safe-keeping thereof, and who was holding the money as treasurer for and on behalf of the association. (R. 38.)

Prior to October 11, 1945, the Wing Mae School in China, an association, acting through its chairman, Frank Ong, delivered to the taxpayer, as treasurer of the association, at his place of business, the sum of \$1,914, for safe-keeping, to be held by the taxpayer as treasurer of the association. At the time of the arrest of the taxpayer, as hereinbefore described, the \$1,914 was seized by the narcotic agents and taken from the possession of the taxpayer, who had no title or interest therein, other than the safe-keeping thereof, and who was holding the money as treasurer for and on behalf of the association. (R. 34-35.)

Prior to October 11, 1945, the Chinese School of Phoenix, Arizona, acting through its chairman, Yeun Lung, delivered to the taxpayer, as its treasurer, at his place of business, the sum of \$1,500 to be held by the taxpayer, as treasurer. At the time of the arrest of the taxpayer, as hereinbefore described, the \$1,500 was seized by the narcotic agents and taken from the possession of the taxpayer, who had no title or interest therein, other than the safe-keeping thereof and who was holding the money for and on behalf of the school as treasurer. (R. 36-37.)

Prior to October 11, 1945, the Chinese Chamber of Commerce, a corporation, acting through its agents, delivered to the taxpayer, as treasurer of the corporation, at his place of business, the sum of \$838.40 to be held by the taxpayer, as treasurer of the corporation. At the time of the arrest of the taxpayer, as hereinbefore described, the \$838.40 was seized by the narcotic agents and taken from the possession of the taxpayer, who had no title or interest therein, other than the safe-keeping thereof, and who was holding the money as treasurer for and on behalf of the corporation. (R.32-33.)

The District Court further found that the above-described fund, aggregating \$15,953.81, was in the possession of the Collector and that the Collector had refused to deliver the fund to the appellees. (R. 33, 36, 37, 38.) ²

On March 21, 1947, the District Court originally entered judgment against the Collector in the aggregate sum of \$17,453.81. (R. 5, 41-43.) On March 31, 1947, a motion for new trial was filed in behalf of the Collector (R. 43-46), which motion came on for hearing on May 23, 1947, at which time the District Court granted the motion as to the fourth cause of action and denied it as to the remaining causes of action. (R. 48.) On May 26, 1947, the Collector filed a motion to vacate and set aside the judgment and to dismiss the complaint for lack of jurisdiction (R. 49-50) supported by an affidavit of the Collector (R. 50-51.) ³ On the same

² Since the fourth cause of action, wherein Henry Ong, as president of Sun Kwung Tong Company, an association, was plaintiff in the court below, was dismissed with prejudice (R.52), no reference to the findings made by the court below with respect thereto is herein made.

³ The belated filing of the motion to dismiss was caused by the discovery on or about May 26, 1947, that the money seized from the taxpayer and applied against his unpaid taxes, had been on October 30, 1945, covered and deposited into a Treasury account of the Treasury of the United States, and that therefore the Collector did not have the money in his possession at the time the suit was instituted.

date the motion was denied and final judgment was entered in favor of appellees and against the Collector for the aggregate sum of \$15,953.81. (R. 42, 52.)

SPECIFICATION OF ERRORS TO BE RELIED UPON

The Collector relies upon the following errors as a basis for this appeal (R. 55-57) :

1. The District Court erred in concluding that appellees were entitled to recover from the Collector the aggregate sum of \$15,953.81 representing a portion of the amount seized by the Collector as the property of the taxpayer to satisfy an assessment and levy for unpaid taxes.

2. The District Court erred in failing to conclude that the Collector was entitled to judgment dismissing the complaint filed herein.

3. The District Court erred in finding that the Collector had in his possession the sum of \$15,953.81 which it ordered to be paid to appellees herein.

4. The District Court erred in failing to make a finding that the Collector did not have in his possession the sum of \$15,953.81.

5. The District Court erred in denying the Collector's motion to vacate and set aside the judgment entered herein.

6. The District Court erred in denying the Collector's motion to dismiss for lack of jurisdiction for the reason that it was without jurisdiction of the subject matter of the complaint filed herein since appellees had not filed claims for refund as required by Section 3772 of the Internal Revenue Code.

7. The District Court erred in denying the Collector's motion to dismiss for lack of jurisdiction for the

reason that it was without jurisdiction over the Collector or over the fund which was ordered to be paid by him to appellees, since the fund, representing a portion of the amount seized from the taxpayer, was not in the possession of or under the control of the Collector, the fund having been covered and deposited into the Treasury of the United States prior to the institution of this proceeding pursuant to the provisions of Section 3971 of the Internal Revenue Code.

SUMMARY OF ARGUMENT

The order of the District Court denying the Collector's motion to vacate and set aside the judgment entered herein and to dismiss the complaint was erroneous because the court was clearly without jurisdiction over the Collector or over the money which was ordered to be paid to appellees since no claims for refund of the amount sought to be recovered had been filed, as required by Section 3772 of the Internal Revenue Code. That section of the statute provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax, or of any sum alleged to have been in any manner wrongfully collected until a claim for refund has been duly filed with the Commissioner of Internal Revenue.

The District Court's finding that the Collector had in his possession the sum of \$15,953.81, which was ordered to be paid to appellees, was also erroneous because the record shows that this money, together with the balance of the amount seized from the taxpayer and applied to his unpaid taxes, had been covered or deposited by the Collector prior to the institution of the suit in a Treasury account of the Treasury of the United States, as required by Section 3971 of the Internal Revenue Code.

Under all of the circumstances, the District Court was clearly without jurisdiction in rendering a money judgment against the Collector. If the funds had been in the possession of the Collector, it is possible that the court could have ordered the money to be returned. However, as the money was collected in good faith and under color of right and turned into the Treasury in due course, there seems to be little doubt but that the recovery thereof can only be accomplished by following the procedure required by Section 3772 of the Code, or in a suit against the United States under the Tucker Act, based upon an implied contract.

ARGUMENT

I

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO ENTERTAIN THE INSTANT SUIT AGAINST THE COLLECTOR

Section 3772 (a) (1) of the Internal Revenue Code, *supra*, provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any sum alleged to have been collected without authority, or in any manner wrongfully collected, until a claim for refund has been duly filed with the Commissioner according to the provisions of law in that regard, and the Regulations of the Secretary established in pursuance thereof. Section 3772 (a) (2) of the Code further provides that no suit or proceeding shall be begun before the expiration of six months from the date of filing of such claim unless the Commissioner renders a decision thereon within that time, nor after two years from the date of official disallowance of the claim. *Moore Ice Cream Co. vs. Rose*, 289 U. S. 373.

Congress has thus provided an orderly method for obtaining repayments of overpayments of taxes or sums alleged to have been wrongfully collected in any manner, or which may have improperly come into the possession of the Treasury of the United States. The phraseology of Section 3772 in all its parts imports the specific procedure to be followed before recovery of tax collections by suit can be obtained.

We submit that the order entered by the court below, denying the Collector's motion to vacate and set aside the judgment entered in favor of appellees and against the Collector, and its failure to dismiss the complaint for lack of jurisdiction was clearly erroneous. The record shows on its face that no claims for refund were filed by appellees for the recovery of the fund in controversy, as required by Section 3772 (a) and the Regulations promulgated pursuant thereto. Treasury Regulations 111, Sec. 29.322-3.

The filing of a claim as a prerequisite to a suit to recover taxes paid or erroneously collected is a familiar provision of the revenue laws, compliance with which may be insisted upon. *United States vs. Felt & Tarrant Co.*, 283 U. S. 269. The main object of the requirement is to advise the Commissioner of the demands or claims intended to be asserted so as to insure an orderly administration of the revenue. Here, there was no compliance with the statute, nor was there a waiver of its conditions, since the Commissioner had no knowledge of the demands made by appellees, and took no action with respect thereto. *United States vs. Felt & Tarrant Co.*, *supra*; *Tucker vs. Alexander*, 275 U. S. 228; *Moore Ice Cream Co. vs. Rose*, *supra*.

There can be no question but that the Collector was acting in his official capacity at the time of the receipt

by him of the money from the narcotic agents. The record shows that an assessment had been duly and regularly made by the Commissioner against the taxpayer for unpaid 1943 and 1944 income taxes, and that after the money seized from him had been turned over to the Collector, the sum of \$20,915.02 thereof was on October 30, 1945, applied against the unpaid income taxes of the taxpayer. We submit that the Collector, acting under the directions of the Commissioner, was under a ministerial duty to proceed to collect the assessment in any manner whatever upon receipt by him of the Commissioner's assessment list. Section 3641, Internal Revenue Code (26 U.S.C. 1940 ed., Sec. 3641). There was nothing left to his discretion. See *Moore Ice Cream Co. vs. Rose*, *supra*, p. 381.

The authorities have generally recognized the rule that where a Collector is sued on the theory that he has wrongfully collected money for taxes, the taxpayer or the person from whom the money was collected, is required to first comply with the provisions of Section 3772 of the Internal Revenue Code and that a failure to so comply is jurisdictional. This rule is equally applicable where money has been wrongfully collected from one person and applied to the taxes of another. In *Karno-Smith Co. vs. Maloney*, 112 F. 2d 690 (C.C.A. 3d) the court held (p. 692) that Section 3772 (a) (1) of the Internal Revenue Code clearly authorized the recovery of "any sum * * * in any manner wrongfully collected", and that "the statute is sufficiently broad to cover a payment by one other than a taxpayer." *White vs. Hopkins*, 51 F. 2d 159 (C.C.A. 5th); *United States vs. S. F. Scott & Sons*, 69 F. 2d 728 (C.C.A. 1st).

In *Bladine vs. Chicago Joint Stock Land Bank*, 63 F. 2d 317 (C.C.A. 8th), the question involved was somewhat similar to that present here. In that case an as-

assessment of a deficiency estate tax had been made against the estate of a decedent in June, 1924. The decedent died in 1918. Prior to June, 1924, the heirs of the decedent had borrowed money from the Chicago Joint Stock Land Bank and others, and had given a mortgage upon lands inherited from the decedent to secure such loans. These mortgages were foreclosed as defaults occurred; the lands were bid in by the mortgagees, and sheriffs' deeds were issued to them, so that each of the mortgagees owned lands which previously had belonged to the decedent, at the time the Collector notified them that he would distrain on the lands unless payment of the estate tax assessment was made. In order to avoid having the lands so acquired sold by the Collector under distraint proceedings, and to avoid clouds upon their title, the owners of the land finally paid the tax under protest. Subsequently, a claim for refund was filed by them and upon rejection of the claim actions were brought by the Chicago Joint Stock Land Bank and others against the Collector, and consolidated for trial. The Government contended that the claim filed was defective, which precluded the refund of the money which had been unlawfully exacted. The court, after commenting on the sufficiency of the facts set forth in the claim for refund as a ground for the recovery of the money in controversy, said (p. 320):

U. S. Code, title 26, Sec. 156, 26 USCA Sec. 156 (see U. S. C. Supp. VI, title 26, Sec. 1672), however, makes no express distinction between an illegal tax and a sum wrongfully collected; and in *Sage vs. United States*, *supra*, page 36 of 250 U. S., 39 S. Ct. 415, 416, the Supreme Court uses this broad language with reference to suits against a collector, "It is true that the statutes modify the common law liability for money wrongfully collected by duress so far as to require a preliminary ap-

peal to the Commissioner of Internal Revenue before bringing a suit"; so the contention of the Collector, that the appellees were required to show the same meticulous compliance with the provisions of the statute and regulations relating to a claim for refund as any taxpayer, seems justified. That a strict compliance is required, if not waived, as a prerequisite to suits by taxpayers, is well settled. *Maas & Waldstein Co. vs. United States*, 283 U. S. 583, 51 S. Ct. 606, 75 L. Ed. 1285; *Taber vs. United States* (C.C.A. 8) 59 F (2d) 568. See also, *United States vs. Felt & Tarrant Mfg. Co.*, 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025; *United States vs. Henry Prentiss & Co.*, 53 S. Ct. 283, 77 L. Ed.—, opinion filed January 9, 1933; *United States vs. Factors & Finance Co.*, 53 S.Ct.287, 77 L. Ed.—, opinion filed January 9, 1933; *Tucker vs. Alexander* (C.C.A. 8), 15 F. (2d) 356; *Red Wing Malting Co. vs. Willcuts* (C.C.A. 8) 15 F. (2d) 626, 49 A.L.R. 459; *J. P. Stevens Engraving Co. vs. United States* (C.C.A. 5) 53 F. (2d) 1. We have, however, no doubt that the claim for refund with which we are concerned complied with the law and gave to the Commissioner all the information to which he was entitled, and all that it was necessary for him to have in order to satisfy himself that the appellees were making claims for the recovery of sums wrongfully exacted by the collector of internal revenue, and the precise grounds thereof.

II

THE JUDGMENT ENTERED BY THE DISTRICT COURT WAS ERRONEOUS BECAUSE IT IS IMPOSSIBLE FOR THE COLLECTOR TO COMPLY WITH ITS TERMS

The judgment order entered by the court below directed the Collector to pay over to the appellees the aggregate sum of \$15,953.81. We submit that such an

order was erroneous because the record shows on its face that the Collector cannot comply with its terms.

The record shows that after the money received by the Collector from the narcotic agents had been credited against the unpaid taxes of the taxpayer, it was immediately covered and deposited into a Treasury account, pursuant to the specific directions contained in Section 3971 of the Internal Revenue Code, *supra*.⁴ Since October 30, 1945, the money has been in the legal possession of the Treasury of the United States. We submit that the moment the money was deposited to the credit of the Treasurer of the United States, the power of the Collector over the fund ceased. Money in the United States Treasury may only be paid out pursuant to an act of Congress (Constitution of the United States, Art. I, Sec. 9, Clause 7) and the Collector has been granted no authority to return money deposited by him. There is no statute that authorizes a Collector to demand the summary return of tax collections out of the Treasury or that contemplates that he shall be able personally to return them to the person from whom the taxes were collected. *Elliott vs. Swartwout*, 10 Pet. 137. Neither does a Collector have any authority to make a claim upon the Treasury for a direct refund in his official name, and the Regulations of the Treasury Department dealing with the filing of claims for refund (Sec. 29.322-3, Regulations 111) specifically provide that a claim which does not comply with the provisions of those Regulations will not be considered for any purpose as a claim for refund. The fact that a certificate of probable cause was issued by the court below (R.47-48), does not give the Collector any control over the funds in the Treasury, but simply converts the suit against the Collector in effect

⁴ The exceptions referred to in Section 3971 are not pertinent here.

into one against the United States. Moreover, the certificate of probable cause does not provide any means for circumventing the requirements of Section 3772 of the Code and the Treasury Regulations promulgated pursuant thereto for obtaining a refund of money wrongfully or erroneously collected. *Sheehan vs. Hunter*, 133 F. 2d 303, 304 (C.C.A. 5th).

III

THE DISTRICT COURT HAD NO JURISDICTION TO ENTER MONEY JUDGMENTS AGAINST THE COLLECTOR

It seems clear that the court below erred in rendering money judgments against the Collector. If the funds had been in the possession of the Collector and he had not deposited them in the depository of the Treasury of the United States, it is possible that the court below could have directed their return. ⁵ *Long vs. Rasmussen*, 281 Fed. 236 (Minn.). However, under all of the circumstances, there seems to be little doubt that the recovery of the money could only be accomplished by following the procedure required for the recovery of tax wrongfully or erroneously collected, as provided by Section 3772 of the Code, or in a suit against the United States under the Tucker Act, c. 359, 24 Stat. 505, based upon an implied contract.

In *Kirkendall vs. United States*, 31 F. Supp. 766 (C. Cls.), a somewhat similar situation was present. In that case, the administrators of the estate of James F. Kirkendall, deceased, brought an action against the United States based upon an implied contract for the

⁵ In *Gee Soot Hong vs. Stuart, Collector*, the companion case consolidated for trial with the instant cause (R.27), the court below entered judgment directing the Collector to return two uncashed cashiers' checks which had likewise been seized from the taxpayer and turned over to the Collector and which checks at the time that action was instituted, were still in the possession of the Collector.

recovery of monies appropriated by the defendant and applied against the unpaid taxes of another. It appears that Kirkendall and others had been arrested in connection with the fraudulent use of the mails. After his arrest, the contents of a safe deposit box, consisting of money, was confiscated by the police officers, and later turned over to the postal inspectors to be used as evidence in the trial of Kirkendall and others for use of the mails to defraud. Thereafter, an assessment of income taxes was made against one Oscar M. Hartzell, the promoter of the scheme, and pursuant to a warrant for distraint and levy made on the postal inspector, the Collector of Internal Revenue obtained the money taken from the safe deposit box and applied that amount to the outstanding assessment against Hartzell. After police questioning Kirkendall was released under bond and died approximately three hours after his release. The evidence in the case clearly established that the money belonged to Kirkendall and that it did not belong to Hartzell. The Court of Claims found that the United States had in its possession money which had been wrongfully obtained from plaintiff and her husband, and concluded that she, as administratrix of her husband's estate, was entitled to recover the money so seized. In so holding, the court said (pp. 769-770):

When the Government has illegally received money which is the property of an innocent citizen and when this money has gone into the Treasury of the United States, there arises an implied contract on the part of the Government to make restitution to the rightful owner under the Tucker Act, 24 Stat. 505, and this court has jurisdiction to entertain the suit.

As was said by the Supreme Court in the case of *United States vs. State Bank*, 96 U.S. 30, 35, 36, 24 L. Ed. 647:

“* * * An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial.

* * *

“But surely it ought to require neither argument nor authority to support the proposition, that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.”

See also *Dooley vs. United States*, 182 U.S. 222, 21 S. Ct. 762, 45 L. Ed. 1074; *Basso vs. United States*, 239 U. S. 602, 36 S. Ct. 226, 60 L. Ed. 462; and *Bull vs. United States*, 295 U. S. 247, 55 S. Ct. 695, 79 L. Ed. 1421.

See also *Schwartz vs. United States* (S.D. N.Y.), decided January 7, 1939 (24 A. F. T. R. 1140).

CONCLUSION

The case should be remanded for the entry of a judgment dismissing the complaint.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,
GEORGE A. STINSON,
FRED J. NEULAND,
*Special Assistants to the
Attorney General.*

FRANK E. FLYNN,
United States Attorney.

CHARLES B. McALISTER,
Assistant United States Attorney.

January, 1948.



No. 11771

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM P. STUART, United States Collector of
Internal Revenue in and for the State of Arizona,
Appellant,
vs.

HENRY ONG, President of Sun Kwung Tong Com-
pany, an association, CHINESE CHAMBER OF
COMMERCE OF PHOENIX, a corporation;
FRANK ONG, as Chairman of the Wing Mae School
in China, an association; YUEN LUNG, Chairman
of the Chinese School of Phoenix, Arizona, an as-
sociation; and FRED WONG, Chairman of the
Chinese War Relief Association, an association,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT,
OF ARIZONA

BRIEF OF THE APPELLEES

JERMAN & FLYNN
Attorney for Appellees



No. 11771

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

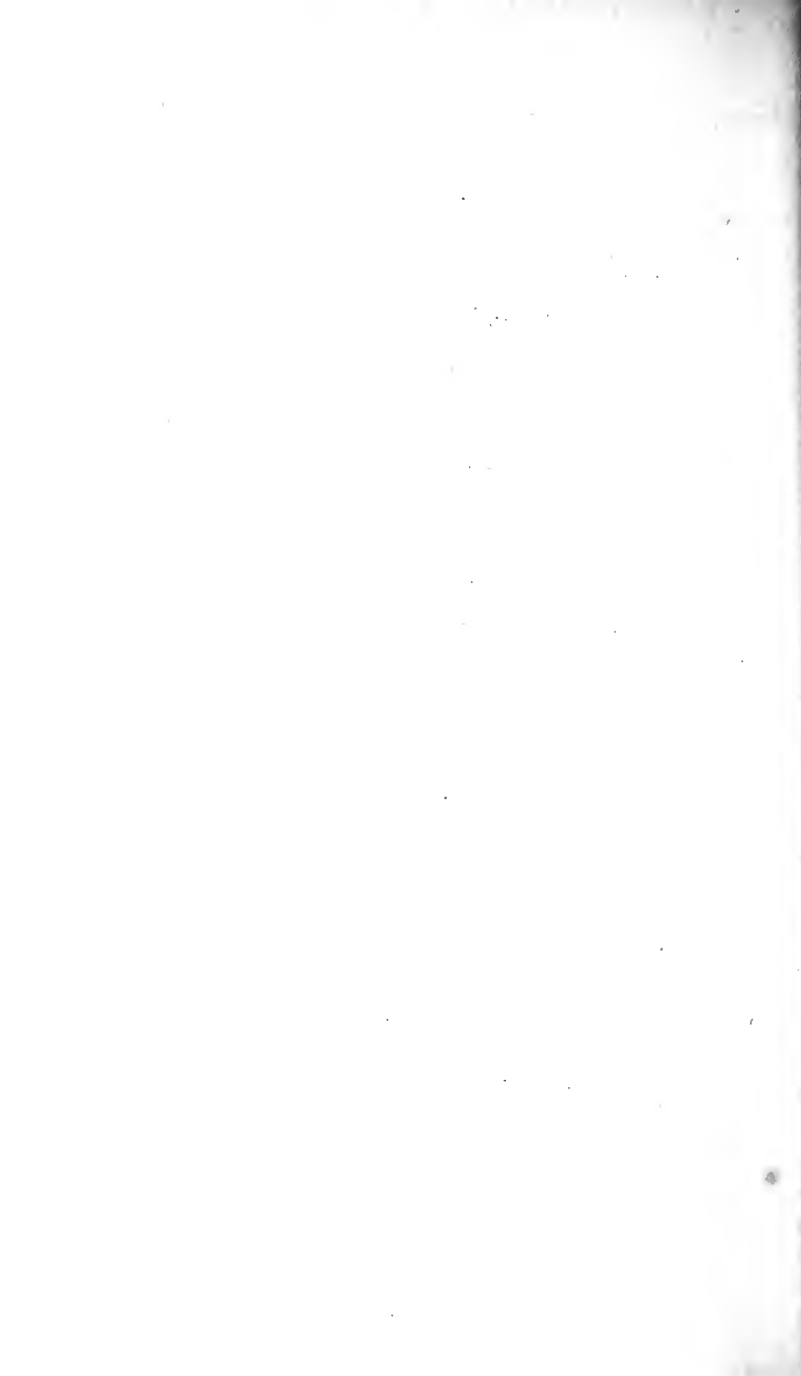
WILLIAM P. STUART, United States Collector of
Internal Revenue in and for the State of Arizona,
Appellant,
vs.

HENRY ONG, President of Sun Kwung Tong Com-
pany, an association, CHINESE CHAMBER OF
COMMERCE OF PHOENIX, a corporation;
FRANK ONG, as Chairman of the Wing Mae School
in China, an association; YUEN LUNG, Chairman
of the Chinese School of Phoenix, Arizona, an as-
sociation; and FRED WONG, Chairman of the
Chinese War Relief Association, an association,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT
OF ARIZONA

BRIEF OF THE APPELLEES

JERMAN & FLYNN
Attorney for Appellees



INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Summary of the argument.....	4
 Argument:	
I. Strict compliance with Section 3772 of the Internal Revenue Code was not required of the appellees in this case and the appellees have adequately complied with the provisions thereof	5
II. The issuance of a certificate of probable cause converts a suit against the collector in effect to one against the United States Government	10
Conclusion	13

CITATIONS

Cases

	PAGE
<i>Bladine v. Chicago Joint Stock Land Bank</i> , 63 F. (2d) 317.....	9
<i>Cosulich Line of Trieste v. Eltin</i> , 40 F. (2d) 220 (CCANY 1930).....	12
<i>Crocker v. Malley</i> , 249 U.S. 223, 235, 39 S.Ct. 270, 63 L.Ed. 573, 2 A.L.R. 1601	11
<i>DeLima v. Bidwell</i> , 21 S.Ct. 743, 746, 182 U.S. 1, 45 L.Ed. 1041.....	12
<i>Huntley v. Southern Oregon Sales</i> , 104 F. ⁽²⁾ 153 (CCA9).....	11
<i>Karno-Smith Co. v. Maloney, Collector</i> , 112 F. (2d) 690 (CCA3).....	7
<i>Land v. Dollar</i> , 67 S.Ct. 1009 (Decided April 7, 1947).....	10
<i>Lowe Bros. Co. v. United States</i> , 304 U.S. 302, 306, 58 S.Ct. 896, 82 L.Ed. 1362.....	11
<i>Moore Ice Cream Co. v. Rose</i> , 289 U.S. 373, 378, 53 S.Ct. 620, 77 L.Ed. 1265.....	11
<i>Sheehan, et al. v. Hunter</i> , 133 F. (2d) 303, 304 (CCA5).....	11
<i>United States v. Kales</i> , 62 S.Ct. 214, 314 U.S. 186, 86 L.Ed. 132.....	12
<i>United States v. Sherman</i> , 98 U.S. 565, 567, 25 L.Ed. 235.....	11
<i>White v. Hopkins</i> , 50 F. (2d) 151 (CCA5).....	8

Statutes

	PAGE
Constitution of the United States, Fourteenth Amendment	9
United States Code Annotated, Section 842, Title 28.....	10
Rule 12, Subsec. (h), Title 28.....	13



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM P. STUART, United States Collector of
Internal Revenue in and for the State of Arizona,
Appellant,

vs.

HENRY ONG, President of Sun Kwung Tong Com-
pany, an association, CHINESE CHAMBER OF
COMMERCE OF PHOENIX, a corporation;
FRANK ONG, as Chairman of the Wing Mae School
in China, an association; YUEN LUNG, Chairman
of the Chinese School of Phoenix, Arizona, an as-
sociation; and FRED WONG, Chairman of the
Chinese War Relief Association, an association,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT
OF ARIZONA

BRIEF OF THE APPELLEES

JERMAN & FLYNN
Attorney for Appellees

OPINION BELOW
No written opinion filed.

JURISDICTION

Jurisdictional facts are set forth in the appellant's
opening brief.

QUESTIONS PRESENTED

1. Whether Section 3772 of the Internal Revenue
Code applies to the appellees herein, and whether or

not the appellees must comply with the terms thereof prior to the institution of an action against an agent of the United States Government for the return of moneys wrongfully seized and withheld.

2. Whether the District Court had jurisdiction to enter a money judgment against the collector where there was no showing during the trial of the case that the moneys involved were not in the collector's possession.

STATEMENT

The statement contained in the appellant's opening brief in general sets forth the facts in a clear and concise manner. There are, however, certain features omitted in the appellant's statement which we desire to point out.

As stated by the appellant in the opening brief, the funds in question were seized on or about October 11, 1945, from Ung Too Thet, alias Ung Kok Si. Thereafter during the month of November, 1945, the appellees, and each of them, filed a demand for refund with William P. Stuart, Collector of Internal Revenue for the State of Arizona. The demands were filed when it was determined by counsel for the appellees that the funds in question had been turned over to the Collector of Internal Revenue, the appellant herein, by the arresting narcotic agents. (See Appendix 1)

The appellant did not acknowledge receipt of the demands for refund and no information was available with reference to the disposition thereof, save and except oral information to the effect that the claims had been forwarded to the Commissioner of Internal Revenue in Washington, D. C.

What disposition was made of the funds in question

after they were received by the Collector of Internal Revenue from the narcotic agents does not appear in the record until the appellant's motion to dismiss was filed on May 26, 1947. (R. 51.) The motion to dismiss was filed three days after the motion for a new trial had been denied. (R. 48) The motion to dismiss is supported by an affidavit of the appellant wherein it states, among other things, that the funds had been covered to a Treasury account on the 30th day of October, 1945. (R. 51)

It is noted that the appellant makes this affidavit. However, in the trial of the issues embraced by the complaint and the answer thereto, no mention was made of the fact that the funds were not in the possession of the appellant during the course of the trial, or that the same had been covered into the Treasury. (R. 51)

The motion to dismiss for lack of jurisdiction filed by the appellant on May 26, 1947, was denied by the court on the same day it was filed, and was denied before the appellees had an opportunity to file any controverting affidavits. (R. 52)

The affidavit in support of the motion to dismiss and the answer filed to the plaintiff's complaint both admit that the demands for refund had been filed by the appellees with the appellant. (R. 21; 49; 51)

On the 31st day of January, 1946, a request was made by the appellees, and each of them, through channels to the Attorney General of the United States of America for permission to sue the United States Government for a return of the funds in question illegally seized and held. (See Appendix 12)

On the 20th day of February, 1946, the appellees

were advised by the office of the United States Attorney General in and for the District of Arizona that permission to sue the United States Government had been denied by the Attorney General of the United State of Arizona. (See Appendix 14) Thereafter on March 1, 1946, the present action was instituted. (R. 20)

SUMMARY OF THE ARGUMENT

The appellees contend that they are not strictly taxpayers within the meaning of the provisions of Section 3772 of the Internal Revenue Code and were not required to comply strictly with the terms thereof prior to the institution of the action. The appellees further contend that there was sufficient compliance upon their part with the provisions of Section 3772 of the Internal Revenue Code to give the District Court jurisdiction in the action.

The mere fact that the collector, who had wrongfully seized and withheld funds belonging to innocent third parties, covered the funds into the Treasury department did not prevent a judgment from being rendered against him, and where there was no showing made during the trial of the case by the Collector that the moneys were not in his possession at the time of the trial, the defense of having covered the said moneys into the Treasury is waived, and cannot be interposed for the first time upon appeal.

The issuance of a certificate of probable cause converts a suit against the collector in effect to one against the United States Government.

ARGUMENT

I.

STRICT COMPLIANCE WITH SECTION 3772 OF THE INTERNAL REVENUE CODE WAS NOT REQUIRED OF THE APPELLEES IN THIS CASE AND THE APPELLEES HAVE ADEQUATELY COMPLIED WITH THE PROVISIONS THEREOF.

The appellees desire to preface this argument with a brief statement of the action taken prior to the institution of the suit.

Shortly after the moneys were seized from the appellees, they, and each of them, filed a demand with the Collector of Internal Revenue in and for the District of Arizona. The demands were clear and concise, and clearly showed the position and claim of each of the appellees. (See Appendix 1)

The demands were filed with the collector and forwarded to the Commissioner of Internal Revenue, Washington, D. C. It is true that these demands were not filled out on any form furnished by the United States Government. They were simply demands stating the appellees' position and claim with reference to the moneys seized and wrongfully withheld by the Collector of Internal Revenue. When the demands were filed with the Collector, he was put on notice that the moneys in his possession did not belong to Ung Too Thet, alias Ong Kok Si, the taxpayer against whom a tax assessment was being levied. Certainly it cannot be argued that the appellees were taxpayers within the meaning of Section 3772 with reference to their moneys wrongfully seized. It can not be argued that they must fill out any form furnished by the United States Government for a tax refund. Strictly speaking, they

were not asking for a tax refund, but were merely asking for the refund of moneys wrongfully seized and withheld.

Therefore, by filing the demands with the Collector of Internal Revenue, he was put on notice and was fully apprized of the claims of the appellees, and each of them, that is as to the amounts and the reason for their respective claims. The demands made upon the Collector, it is urged, were sufficient compliance with Section 3772 of the Internal Revenue Code, and furnished the Collector with all of the necessary information.

When the funds in question were seized by the Collector of Internal Revenue, he acted as an agent for the Commissioner of Internal Revenue, and when the funds were turned in by the Collector to the Commissioner, he again acted as his agent. Therefore, if he was an agent for the Commissioner in the delivery of the funds to the Commissioners, he likewise is agent for the transmission of the demands, and we respectfully urge that the demands made upon the Collector of Internal Revenue were in truth and in fact demands made upon the Commissioner of Internal Revenue, since a demand made upon an agent in a case of this nature is a demand upon the principal.

The demands for the refund submitted by the appellees in this case were identical with those submitted in the companion case, *Gee Soot Hong v. William P. Stuart, Collector*, (R. 27) and in the *Hong* case the Collector considered the demands adequate and in sufficient compliance with Section 3772, and satisfied the judgment of the District Court returning to the plaintiffs in that case two uncashed cashier's checks, which

were in the possession of the Collector. See footnote, page 16, Appellant's Opening Brief.

It is ridiculous to argue that the appellees, innocent third parties, should be forced to litigate the tax claims of Ung Too Thet, alias Ong Kok Si, and the United States Government. They had no information as to his taxes, or any knowledge thereof, or any information as to the claims of the United States Government against the said taxpayer, if any.

When the moneys in question were seized by the Collector of Internal Revenue from the narcotic agents, what property rights, if any, did the collector have in and to said funds? The only property rights the Collector could assert against the funds would be the rights of Ung Too Thet, alias Ong Kok Si, the taxpayer. Internal Revenue Agents secure no greater right against property in the hands of a third person than the rights of the third person in and to the said property.

In *Karno-Smith Co. v. Maloney, Collector, Internal Revenue, 112 F. (2) 690 (CCA3)*, the Circuit Court of Appeals for the Third Circuit, at page 692, stated the rule as follows:

“We think it clear that in a case of this kind the rights of the Collector rise no higher than those of the taxpayer whose right to property is sought to be levied on. *U.S. v. Western Union Telegraph Co., 2 Cr., 50 F. (2d) 102.*”

Under the rule cited, the collector in the instant case had no greater property right in and to the funds in question than the taxpayer, Ung Too Thet, alias Ong Kok Si. The evidence in the record now stands undisputed that the funds belonging to the appellees were trust funds held by the taxpayers, Ung Too Thet, alias

Ong Kok Si, and funds in which he had no interest of any kind, but was merely holding the same as trustee. Consequently, what, if any, property right could the Collector have in and to the said funds after seizing them from the taxpayer? We respectfully urge that the Collector could have no property right of any kind therein or any right of possession thereto, and that the said funds now in the Treasury constitute an unjust enrichment at the expense of the appellees, innocent third parties.

Section 3772 of the Internal Revenue Code has been universally construed as applying to taxpayers. In the instant case, the moneys were seized and held by the Collector and applied upon a tax allegedly due and owing the government from Ung Too Thet, alias Ong Kok Si. What is a taxpayer in the light of Section 3772 providing for refunds? Certainly the tax in question applied to Ung Too Thet, alias Ong Kok Si, in this case was not a tax that could be collected from the appellees, or either of them. There were no taxes assessed against them, or either of them, or collected from them, or either of them.

Therefore, this suit may not be referred to as a claim for the refund of taxes. It is actually a suit to recover moneys wrongfully exacted by the Collector under the color of his office from persons against whom no tax was assessed. A taxpayer is defined in *White v. Hopkins*, 50 F. (2d) 151 (CCA5), as follows: "One who pays a tax."

As to the sufficiency of the demands made by the appellees herein for a return of their funds, it seems clear to us that the demands, and each of them, clearly set forth all the necessary information for the Collector of Internal Revenue, and were adequate.

Bladine, Collector, Internal Revenue v. Chicago Joint Stock Land Bank, 63 F. (2d) 317.

As a matter of fact, the appellant in his opening brief, on page 14 thereof, makes the following statement with reference to the sufficiency of the claim:

“We have, however, no doubt, that the claim for refund with which we are concerned complied with the law, and gave to the Commissioner all of the information to which he was entitled, and all that it was necessary for him to have in order to satisfy himself that the appellees were making claim for the recovery of sums wrongfully exacted by the Collector of Internal Revenue, and the precise grounds thereof.”

In view of the fact that the appellees' request to sue the United States Government was not granted, they were left with no alternative save and except to file an action against the Collector for the return of their funds, or in lieu thereof a judgment for the respective amounts. To deprive the appellees from recovering the moneys wrongfully exacted from them by the Collector and denying them any remedy either against the United States or the Collector would amount to the confiscation of property without due process of law and in violation of the *Fourteenth Amendment to the Constitution of the United States*.

Bladine, etc. v. Chicago Joint Stock Land Bank, supra.

Where public officials become tort feasers by exceeding the limits of their authority and where they unlawfully seize and hold a citizen's chattels or realty, recoverable by appropriate action at law or in equity, such a person is not relegated to the court of claims to recover a money judgment. The dominant interest of the sovereign is on the side of the victim. He may

bring a possessory action to regain that which is wrongfully withheld.

Land v. Dollar, 67 S.Ct. 1009 (Decided April 7, 1947)

It must be remembered that this is not a case where the judgments will expend themselves upon the United States Treasury. The funds in question never became the property of the United States but are to this day the property of the appellees. It is a case similar in all respect to *Land v. Dollar* cited supra. To then allow the Treasury to retain the funds in question would constitute as above stated an unjust enrichment at the expense of the appellees. Certainly the United States Government has not reached a point that it will treat its citizens in such a manner. There are no statutes authorizing confiscation of property without due process of law merely because the property happens to be in the hands of a third party. It is unconscionable to believe that a government agent may seize property from a party, and even though it is conclusively proved that the property did not belong to him, apply the same to a debt of the person from whom the property was taken.

II.

THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE CONVERTS A SUIT AGAINST THE COLLECTOR IN EFFECT TO ONE AGAINST THE UNITED STATES GOVERNMENT.

Section 842, Title 28, U.S.C.A., provides as follows:

“When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him

paid into the the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.”

The issuance of a certificate of probable cause converts a judgment against a collector in effect to one against the United States Government.

United States v. Sherman, 98 U.S. 565, 567, 25 L.Ed. 235;

Moore Ice Cream Co. v. Rose, 289 U.S. 373, 378, 53 S.Ct. 620, 77 L.Ed. 1265;

Crocker v. Malley, 249 U.S. 223, 235, 39 S.Ct. 270, 63 L.Ed. 573, 2 A.L.R. 1601;

Lowe Bros. Co. v. United States, 304 U.S. 302, 306, 58 S.Ct. 896, 82 L.Ed. 1362;

Huntley v. Southern Oregon Sales, 104 F(2) 153 (CCA9);

Sheehan, et al. v. Hunter, 133 F. (2d) 303, 304 (CCA5).

The appellant argues in his brief that the District Court erred in entering judgment against the Collector because it was impossible for the collector to comply with the terms thereof. The basis for his argument is that by reason of the fact that the moneys in question had been deposited in the United States Treasury, the Collector had no further jurisdiction thereof and could not return the same to the appellees.

The deposit by the Collector of Customs of fines into the United States Treasury is no bar to a judgment

against him, and a right of action for moneys had and received lies against a collector to recover moneys illegally collected with notice that they were paid under protest.

DeLima v. Bidwell, 21 S.Ct. 743, 746, 182 U.S. 1, 45 L.Ed. 1041;

Cosulich Line of Trieste v. Eltin, 40 Fed. (2d) 220, (CCANY 1930)

Congress, by continuing against an Internal Revenue Collector the right of action for taxes illegally exacted, has for the most practical purposes reduced the collector's personal liability to a fiction, but it was intended that the right to maintain the action and its incidents, including the right to a jury trial, should be left undisturbed until judgment is rendered.

United States v. Kales, 62 S.Ct. 214, 314 U.S. 186, 86 L.Ed. 132.

In the instant case, subsequent to the entry of judgment, the appellant, acting through his attorneys, secured a certificate of probable cause from the United States District Court on the 8th day of May, 1947. (R. 47).

An examination of the certificate reflects that the court made a finding to the effect that the Collector was acting under the direction of the Commissioner of Internal Revenue, and on probable cause. Therefore, as of the 8th day of May, 1947, the date upon which the certificate of probable cause issued (R. 48), the judgments of the appellees herein became in effect judgments against the United States Government, and the argument of the appellant to the effect that the Collector cannot comply with the terms of the judgments is now a moot question.

It is deemed advisable, however, to point out here that during the course of the trial, the Collector made no mention of the fact that the moneys involved were not in his possession during the trial. Such a defense was not raised nor passed upon by the trial court, and was waived. *Federal Rules of Civil Procedure, Rule 12, Subsection (h), Title 28, U.S.C.A.*

It appears from the appellant's opening brief in the footnote on page 7 thereof that the attorneys for the Collector had no information that the funds in question had been turned into the United States Treasury as of October 30, 1945. If on the other hand the Collector and his attorneys were aware of the fact that the funds had been turned into the Treasury on October 30, 1945, and they did not present this defense to the District Court, the same constitutes an intentional misleading of the court.

Certainly, it would be impossible for the appellees or their attorneys to have any information as to what disposition was made of the funds after they were seized by the Collector.

The transfer of funds from one department of the Government to another, without the knowledge of the appellees, should not be allowed to defeat a just claim in a court of justice.

CONCLUSION

The issues raised on this appeal were matters brought to the attention of the trial court on a motion to dismiss after the motion for a new trial had been denied. The motion to dismiss was denied before the attorneys for the appellees had an opportunity to file controverting affidavits or make any record thereon. Consequently, the appellees have been forced to rely

on matters de hors the record in the presentation of their brief. This we regret. On the other hand if the defense had been raised properly during the course of the trial, a complete record could have been made thereon.

The actions of the agents of the Government in the handling of this case reflect a disregard for the rights of the appellees herein, and by failing to raise the defenses presented on the motion to dismiss at the trial of the case, have placed the trial court and the appellees in a very peculiar position. Certainly such activity on the part of Government agents should not be tolerated in the United States Courts.

All of the points raised on this appeal could easily have been raised during the course of the trial, which would have given the trial court the opportunity to pass thereon, and would especially have given the appellees an opportunity to make a record. The failure to do so rests entirely with the Government agents in charge of the case, and as stated above, we are forced to rely on matters set forth in the Appendix in order to present the questions clearly to this court.

The equities in this case overwhelmingly preponderate in favor of the appellees. Hypertechnical defenses and niceties should not be allowed to defeat a just claim.

It is respectfully submitted that, on the state of the record, an affirmance of the judgments of the trial court is commanded.

Respectfully submitted
JERMAN & FLYNN
Attorneys for Appellees

February, 1948

APPENDIX

DEMAND FOR FUNDS BELONGING
TO SUN KWONG TONG COMPANY

TO THE HONORABLE:

T. A. Talent, District Supervisor
Earl A. Smith, Deputy Supervisor
District X, U. S. Treasury Department
Phoenix, Arizona

W. P. Stuart
U. S. Collector of Internal Revenue
Phoenix, Arizona

Comes now Henry Ong as President of the Sun Kwung Tong Company, and respectively represents, requests and demands:

I.

That he is the president of the Sun Kwung Tong Company.

II.

That the Sun Kwung Tong Company delivered the sum of \$1,900.00, more or less, in cash for safekeeping to one Ung Too Thet, alias Ong Kok Si, to be held in trust for the said Sun Kwung Tong Company. The undersigned has been informed and believes and therefore alleges that said identical funds were placed in a safe at 113 East Madison St., Phoenix, Arizona and were there on October 11, 1945 when United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds.

That said funds were not loaned to the said Ung Too Thet, alias Ong Kok Si, but held strictly for the benefit of said Sun Kwung Tong Company.

WHEREFORE, the undersigned as President of the Sun Kwung Tong Company does hereby request and demand the return and delivery of the sum of \$1,900.00 in cash seized as aforesaid.

Dated this 29th day of November, 1945.

/s/ HENRY ONG

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss.

HENRY ONG, being first duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief, and as to those he verily believes the same to be true.

/s/ HENRY ONG

Subscribed and sworn to before me this 29th day of November, 1945.

/s/ WALTER ONG
Notary Public

(NOTARIAL SEAL)

My commission expires Nov. 18, 1949.

DEMANDS FOR FUNDS BELONGING TO
CHINESE CHAMBER OF COMMERCE OF
PHOENIX, ARIZONA

TO THE HONORABLE:

T. A. Talent, District Supervisor
Earl A. Smith, Deputy Supervisor
District X, U. S. Treasury Department
Bureau of Narcotics
Phoenix, Arizona

W. P. Stuart
U. S. Collector of Internal Revenue
Phoenix, Arizona

Comes now Henry Gong as President of the Chinese Chamber of Commerce of Phoenix, Arizona, and respectfully represents, requests and demands:

I.

That he is the president of the Chinese Chamber of Commerce of Phoenix, Arizona.

II.

That the Chinese Chamber of Commerce of Phoenix, Arizona delivered the sum of \$800.00, more or less, in cash for safekeeping to one Ung Too Thet, alias Ong Kok Si, to be held in trust for the said Chamber of Commerce. The undersigned has been informed and believes and therefore alleges that said identical funds were placed in a safe at 113 East Madison St., Phoenix, Arizona and were there on October 11, 1945 when United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds.

That said funds were not loaned to the said Ung Too Thet, alias Ong Kok Si, but held strictly for the benefit of said Chamber of Commerce.

WHEREFORE, the undersigned as President of the Chinese Chamber of Commerce of Phoenix, Arizona does hereby request and demand the return and delivery of the sum of \$800.00 in cash seized as afore-said.

Dated this 29th day of November, 1945.

/s/ HENRY GONG

STATE OF ARIZONA }
 COUNTY OF MARICOPA } ss.

HENRY GONG, being duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief, and as to those he verily believes the same to be true.

/s/ HENRY GONG

Subscribed and sworn to before me this 29th day of November, 1945.

/s/ WALTER ONG
 Notary Public

(NOTARIAL SEAL)

My commission expires Nov. 18, 1949.

DEMAND FOR FUNDS BELONGING TO
 WING MAY SCHOOL IN CHINA

TO THE HONORABLE:

T. A. Talent, District Supervisor
 Earl A. Smith, Deputy Supervisor
 District X, U. S. Treasury Department
 Bureau of Narcotics
 Phoenix, Arizona

W. P. Stuart
 U. S. Collector of Internal Revenue
 Phoenix, Arizona

Comes now Frank Ong as chairman of the Wing May School in China and respectfully represents, requests and demands:

5

I.

That he is the Chairman of the Wing May School in China; that a campaign was conducted for the purpose of soliciting funds from among the people in Arizona for the Wing May School in China, and some \$1,900.00, more or less, was raised by such activities.

II.

That thereafter all of said funds in the amount of \$1,900.00, more or less, were delivered to one Ung Too Thet, alias Ong Kok Si, to be kept by him in trust for said school; that the undersigned has been informed and believes and therefore states that the said funds were placed in a safe owned and controlled by said Ung Too Thet, alias Ong Kok Si, as his usual place of business in Phoenix, Arizona, and were kept and held in trust for the said school; that said monies were not loaned to Ung Too Thet, alias Ong Kok Si, or were not to be used by him for his own benefit in any manner whatsoever, but only for safekeeping.

III.

That on October 11, 1945 United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds located in a safe at 113 East Madison St., Phoenix, Arizona, upon the premises wherein Ung Too Thet, alias Ong Kok Si, operated his business; there the funds did not belong to Ung Too Thet, alias Ong Kok Si, but to said school, and the same were placed in said safe for safekeeping only.

IV.

That for some time the Association was unable to transmit said funds to China on account of the war.

WHEREFORE, the undersigned as chairman of the

Wing May School in China does hereby request and demand the return and delivery to said school of the sum of \$1,900.00 in cash seized as aforesaid.

Dated this.....day of November, 1945.

 STATE OF ARIZONA }
 COUNTY OF MARICOPA } ss.

FRANK ONG, being first duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief and as to those he verily believes the same to be true.

 Subscribed and sworn to before me this.....day of November, 1945.

 Notary Public

My commission expires:

 DEMAND FOR FUNDS BELONGING TO
 CHINESE SCHOOL

TO THE HONORABLE:

T. A. Talent, District Supervisor
 Earl E. Smith, Deputy Supervisor
 District X, U. S. Treasury Department
 Bureau of Narcotics
 Phoenix, Arizona

W. P. Stuart
 U. S. Collector of Internal Revenue
 Phoenix, Arizona

Comes now Yeun Lung as Chairman of the Chinese School and respectfully represents, requests and demands:

I.

That he is the Chairman of the Chinese School; that the following named Persons, Yee F. Sing, Henry Gong, Frank Ong, all of Phoenix, Arizona, conducted a campaign of soliciting funds among the people in Arizona for the Chinese School, and did raise some \$1,500.00, more or less, by such activities.

II.

That thereafter all of said funds in the amount of \$1,500.00, more or less, were delivered to one Ung Too Thet, alias Ong Kok Si, to be kept informed and believes and therefore states that the said funds were placed in a safe owned and controlled by said Ung Too Thet, alias Ong Kok Si, at his usual place of business in Phoenix, Arizona, and were kept and held in trust for the said school; that said monies were not loaned to Ung Too Thet, alias Ong Kok Si, or were not to be used by him for his own benefit in any manner whatsoever, but only for safekeeping.

III.

That on October 11, 1945, United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds located in a safe at 113 East Madison St., Phoenix, Arizona, upon the premises whereïn Ung Too Thet, alias Ong Kok Si, operated his business; that the funds did not belong to Ung Too Thet, alias Ong Kok Si, but to said school, and the same were placed in said safe for safe keeping only.

IV.

That for some time the Association was unable to transmit said funds to China on account of the war.

WHEREFORE, the undersigned as chairman of the Chinese School does hereby request and demand the return and delivery to said school of the sum of \$1,500.000 in cash seized as aforesaid.

Dated this.....day of November, 1945.

 STATE OF ARIZONA }
 COUNTY OF MARICOPA } ss.

YEUN LUNG, being first duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief, and as to those he verily believes the same to be true.

 Subscribed and sworn to before me this.....day of November, 1945.

 Notary Public

My commission expires:

DEMAND FOR FUNDS BELONGING TO
 CHINA WAR RELIEF ASSOCIATION

TO THE HONORABLE:

T. A. Talent, District Supervisor
 Earl A. Smith, Deputy Supervisor

District X, U. S. Treasury Department
Bureau of Narcotics
Phoenix, Arizona

W. P. Stuart
U. S. Collector of Internal Revenue
Phoenix, Arizona

Comes now Fred Wong as Chairman of the China War Relief Association of Arizona and respectfully represents, requests and demands:

I.

That he is the Chairman of the China War Relief Association of Arizona; that the following named persons, E. F. Sing, Henry Ong, Frank Ong, H. T. Tang, O. W. Yen, Walter Ong, all of Phoenix, Arizona, conducted a campaign of soliciting funds among the people in Arizona, and also staged various social affairs for the purpose of raising money for the China War Relief Association and did raise some \$14,000.00, more or less, by such activities.

II.

That thereafter all of said funds in the amount of \$14,000.00, more or less, were delivered to one, Ung Too Thet, alias Ong Kok Si, to be kept by him in trust for said Association; that the undersigned has been informed and believes and therefore states that the said funds were placed in a safe owned and controlled by the said Ung Too Thet, alias Ong Kok Si, at his usual place of business in Phoenix, Arizona, and were kept and held in trust for the said Association; that said monies were not loaned to Ung Too Thet, alias Ong Kok Si, or were not to be used by him for his own benefit in any manner whatsoever, but only for safe-keeping.

III.

That on October 11, 1945 United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds located in a safe at 113 East Madison St., Phoenix, Arizona, upon the premises wherein Ung Too Thet, alias Ong Kok Si, operated his business; that the funds did not belong to Ung Too Thet, alias Ong Kok Si, but to said association, and the same were placed in said safe for safekeeping only.

IV.

That for some time the Association was unable to transmit said funds to China on account of the war.

WHEREFORE, the undersigned as chairman of the China War Relief Association of Arizona does hereby request and demand the return and delivery to said association of the sum of \$14,000.00 in cash seized as aforesaid.

Dated this.....day of November, 1945.

STATE OF ARIZONA }
 COUNTY OF MARICOPA } ss.

FRED WONG, being first duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief, and as to those he verily believes the same to be true.

Subscribed and sworn to before me this.....day of November, 1945.

Notary Public

My commission expires:

BUREAU OF NARCOTICS

El Paso, Texas

December 7, 1945

SE-217

Ariz-574

In re: Ung TOO THET alias
ONG KOK SI

Mr. Wallace W. Clark,
Attorney at Law,
Title & Trust Building,
Phoenix, Arizona.

Dear Sir:

This will acknowledge receipt of your letter dated December 1, 1945, transmitting claims for the return of \$17,400.00 seized from the above named person at the time of his arrest.

You are advised that this money was taken from the defendant by a Customs official for safe-keeping and was later seized by deputy collectors of the Collector of Internal Revenue at Phoenix, Arizona. It will be noted that representatives of this office were not concerned with the seizure of these funds; therefore, it is suggested that future correspondence relative thereto be addressed to the Collector of Internal Revenue, Phoenix, Arizona.

I might add, however, that \$3100.00, identified Government funds, was recovered from this defendant by narcotic and customs officers.

Yours very truly,

/s/ TERRY A. TALENT
TERRY A. TALENT
District Supervisor

JERMAN & FLYNN
 Phoenix, Arizona
 January 31, 1946

Mr. Frank E. Flynn
 United States District Attorney
 United States Court House
 Phoenix, Arizona

Dear Mr. Flynn:

Mr. Henry Ong, acting for and on behalf of Sun Kwung Tong Company and as president thereof, Henry Gong, President of Chinese Chamber of Commerce of Phoenix, Arizona, Frank Ong, acting as chairman of Wing Mae School in China, Yeun Lung, chairman of the Chinese School of Phoenix, Arizona, Fred Wong, chairman of China War Relief Association, Gee Soot Hong, Yee Wo & Company, Tom Nom, and Fong W. Yuey, have retained us as their attorneys to represent them in an action wherein the United States Government is a necessary party defendant.

It appears from the facts available that on the 11th day of October, 1945, a Mr. Ung Too Thet, alias Ong Kok Si, was arrested by Narcotite Revenue Agents at his place of business located at 113 East Madison St., Phoenix, Arizona, for violation of the Harrison Narcotic Act and the Import and Export Drug Act. At the time of his arrest he was holding in trust for our clients approximately \$25,000.00, the respective amount for each client is listed as follows:

Sun Kwung Tong Company.....	\$ 1,900.00
Chinese Chamber of Commerce of Phoenix, Arizona	800.00
Gee Soot Hong.....	2,500.00
Yee Wo & Company, Tom Nom, Fong W. Yuey.....	2,500.00
Wing Mae School in China.....	1,900.00
Chinese School	1,500.00
Chinese War Relief Association of Arizona	14,000.00

On October 11, 1945, the arresting agents of the United States Government confiscated the above money and took possession thereof from the said Ung Too Thet, and we are informed and believe that the United States Government, acting through its agents, is applying the said funds on an income tax deficiency and liability of the said Ung Too Thet.

It is the contention of our clients that the amounts above referred to were held in trust, that the said Ung Too Thet had no interest therein and was not the owner thereof, and was merely a trustee.

It now appears as a matter of record in the United States District Court for the District of Arizona that the said Ung Too Thet has pleaded guilty to violation of the Harrison Narcotic Act and the Drug Import and Export Act. On January 28, 1946 Ung Too Thet was sentenced to five years imprisonment by the Honorable Dave W. Ling, United States District Judge for the District of Arizona; imposition of the said sentence was suspended on condition that the said Ung Too Thet depart the continental limits of the United States within thirty days from the date of the sentence.

In view of the fact that the above money referred to is being held by the United States Government, acting through its agents, it will be necessary for our clients to file an action in the United States District Court to secure recovery of the funds which they allege are theirs and which were in the possession of Ung Too Thet as above stated and confiscated by the agents of the United States Government.

We are, therefore, on behalf of our clients, requesting permission to file an action against the United States Government in the United States District Court for the District of Arizona to recover possession of the respective amounts for each of our clients as above set forth. We would appreciate it if you would take this matter up with the Attorney General of the United

States of America at your earliest convenience and favor us with his decision in the premises.

Very truly yours,

JERMAN & FLYNN

By /s/ JAMES E. FLYNN

James E. Flynn

JEF: bz

UNITED STATES ATTORNEY

District of Arizona

Phoenix

February 20, 1946

Jerman & Flynn
Attorneys at Law,
Security Building,
Phoenix, Arizona

Attention: James E. Flynn

Re: In the Matter of Henry Ong, etc.

Gentlemen:

In your letter of January 31, 1946, addressed to this office, you asked in your concluding paragraphs for permission to file an action in the above entitled matter against the United States in the District Court for Arizona.

Copies of that letter were forwarded to the Attorney General and his reply received Monday. This will confirm the statement we gave you over the phone in which we quoted or summarized the following pertinent excerpts from the Attorney General's reply:

"It is noted that the petitioners contemplate filing an action in the United States District Court to secure recovery of the funds which they allege are theirs and which were in the possession of Ung Too Thet, alias Ong Kok Si, which moneys were confiscated by the agents of the United States Gov-

ernment presumably the Collector of Internal Revenue who applied said moneys to the credit of the outstanding income taxes assessed against Ung Too Thet. In view of this, Mr. Flynn has requested permission in behalf of his clients to file an action against the United States in the District Court for the District of Arizona to recover possession of the respective amounts which he designates belongs to each of the petitioners.

“The Attorney General cannot consent to the bringing of an action against the United States as requested. The proposed action will have to be brought in whatever manner and forum may be designated in the statute upon which reliance is placed. . . .”

Very truly yours,

F. E. Flynn,
United States Attorney

/s/ CHARLES B. McALISTER
Charles B. McAlister,
Assistant U. S. Attorney

CBMcA;ah



No. 11773

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

WILLIAM K. CARSON,
Appellee.

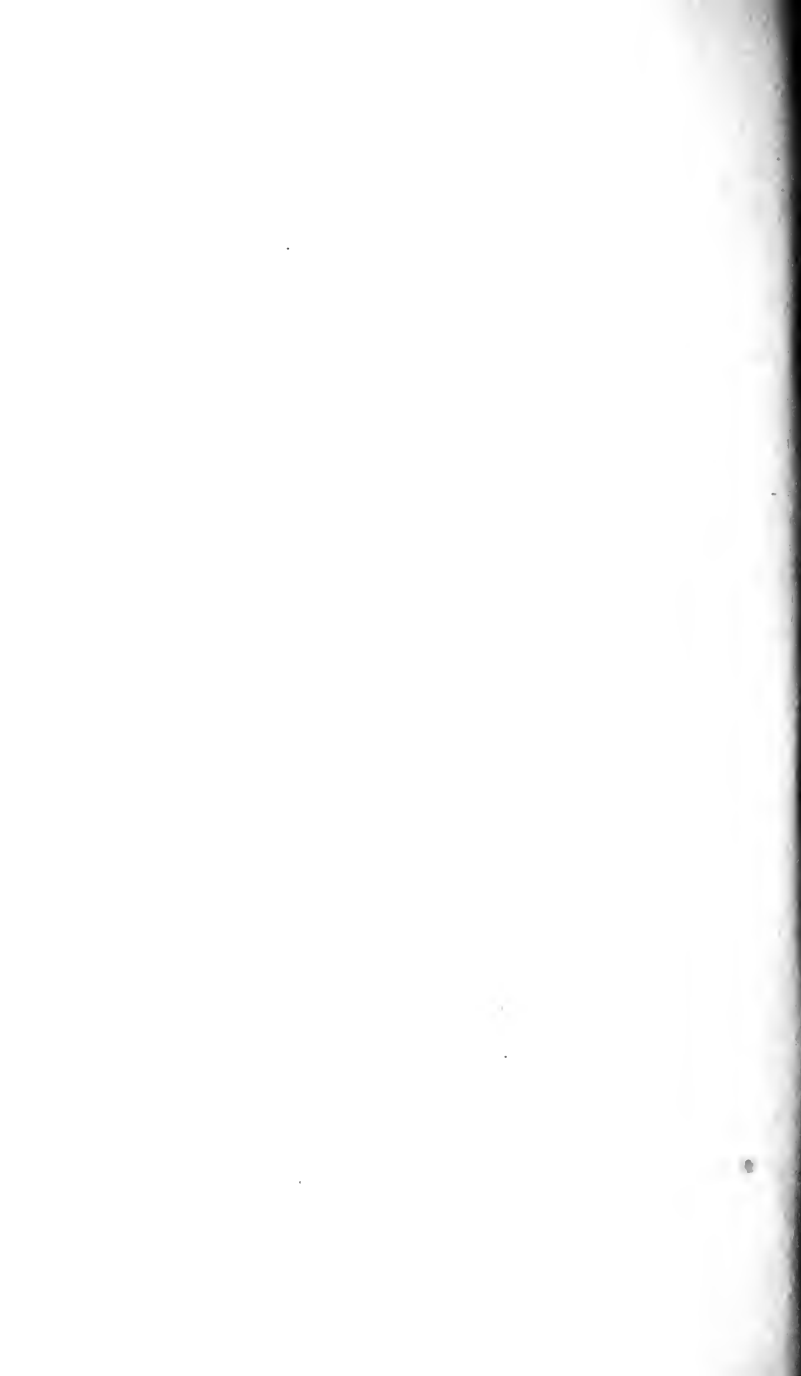
TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC 26 1947

PAUL P. O'BRIEN, CLERK



No. 11773

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

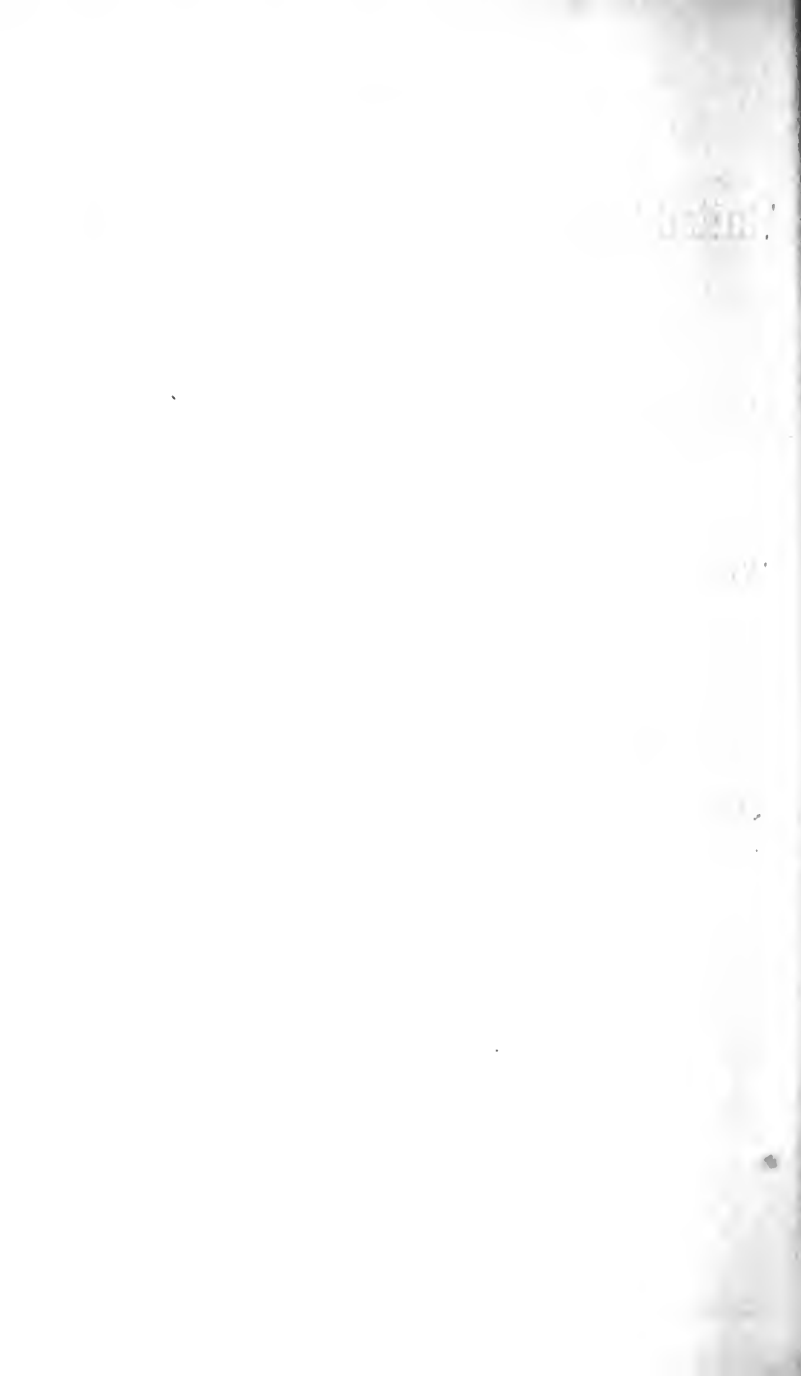
SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

WILLIAM K. CARSON,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer and Demand for Jury Trial.....	7
Appeal:	
Designation of Record to Be Printed and Statement of Points Upon Which Defendant Intends to Rely Upon on (Circuit Court).....	222
Notice of	34
Stipulation Waving Bond on.....	35
Certificate of Clerk.....	36
Complaint for Damages.....	2
Designation of Record to Be Printed and Statement of Points Upon Which Defendant Intends to Rely Upon on Appeal (Circuit Court).....	222
Instructions Requested by Defendants and Refused....	17
Judgment	28
Minute Order of August 14, 1947, Setting Trial	10
Minute Order of August 27, 1947, Impanelling Jury..	11
Minute Order of August 28, 1947 (on Trial).....	13
Minute Order of August 29, 1947 (on Trial).....	27
Minute Order of September 10, 1947, Denying Motion for New Trial.....	33
Motion for New Trial.....	29

	Page
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	34
Notice of Denial of Motion for New Trial.....	33
Notice of Trial.....	10
Objections to Plaintiff's Requested Instructions.....	14
Reporter's Transcript of Proceedings.....	37
Plaintiff's Exhibit (See Index to Exhibits)	
Defendant's Exhibits (See Index to Exhibits)	
Testimony on Behalf of Plaintiff:	
Barnett, Valney—	
Direct examination.....	74
Direct examination (recalled).....	111
Cross-examination	113
Byrne, Daniel J. Jr.—	
Direct examination	69
Cross-examination	72
Redirect examination	73
Carson, William Kent—	
Direct examination	40
Voir dire examination.....	45
Direct examination (resumed).....	45
Cross-examination	55
Redirect examination	66
Recross-examination	67
Redirect examination	68

Reporter's Transcript of Proceedings

Testimony on Behalf of Plaintiff:	Page
Jacobs, Wilson D.—	
Direct examination	77
Voir dire examination.....	80
Direct examination (resumed).....	83
Cross-examination	83
McReynolds, Chester Cornell—	
Direct examination	87
Cross-examination	92
Testimony on Behalf of Defendant:	
Estes, Leslie Arthur—	
Direct examination	140
Graham, Robert Adam—	
Direct examination	114
Direct examination (recalled).....	129
Cross-examination	138
Knight, Kenneth W.—	
Direct examination	127
Sutherland Ross—	
Direct examination	104
Cross-examination	109
Stipulation Waiving Bond on Appeal.....	35
Summons and Return of Marshal.....	5
Verdict of the Jury.....	28

INDEX TO EXHIBITS

Plaintiff's Exhibit

No.	Page
1. Brake club (In Evidence).....	48

Defendant's Exhibits:

A. Photograph of laboratory test No. 424-1 (In Evidence)	135
B. Photograph of laboratory test No. 424-2 (In Evidence)	136
C. Photograph of laboratory test No. 424-3 (In Evidence)	136

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

C. W. CORNELL

O. O. COLLINS

MALCOLM ARCHBALD

JOHN R. ALLPORT

670 Pacific Electric Building

Los Angeles 14, Calif.

For Appellee:

HILDEBRAND, BILLS & McLEOD

312 Bartlett Building

215 West Seventh Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States for the
Southern District of California
Central Division

No. 6950-M

WILLIAM K. CARSON,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendant and for cause of action alleges:

I.

That at all times herein mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California, and other states; and that said defendant was at all times herein mentioned and now is engaged in the business of a common carrier by railroad in interstate commerce in the State of California and other states.

II.

That at all times herein mentioned defendant was a common carrier by railroad engaged in interstate commerce, and plaintiff was employed by defendant in such interstate commerce, and [2] the injuries to plaintiff hereinafter complained of arose in the course of and while plaintiff and defendant were engaged in the conduct of such interstate commerce.

III.

That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. 51, et seq.

IV.

That on or about the 2nd day of February, 1947, at or about the hour of 10:30 o'clock A. M. thereof, plaintiff was employed by defendant as a switchman, working in defendant's railroad yards in the City of Tucson, State of Arizona.

V.

That at said time and place acting in the regular course and scope of his duties, plaintiff was riding on the brake platform of a certain tank car, a portion of a cut of three freight cars which had been kicked over defendant's track #11 in said yards; that it was plaintiff's duty to and he was attempting to slow the movement of said cars by means of operating the brake wheel on said tank car by means of using a brake club; that at said time and place defendant owed to plaintiff the duty of exercising ordinary care to provide him with a reasonably safe equipment with which to work; that at said time and place defendant carelessly and negligently furnished plaintiff with defective brake club in that the same was caused to be weak and not strong enough to stand up under the ordinary work done by plaintiff; that as a direct and proximate result of said carelessness and negligence, said brake club was caused to break thereby causing plaintiff to be thrown violently against the end of the said tank car and to sustain the injuries hereinafter enumerated.

VI.

That as a direct and proximate result of the carelessness [3] and negligence of defendant, as aforesaid, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following personal injuries, to wit: severe injury in the region of the right shoulder, severe strain in the region of the low back; severe damage to the left side of plaintiff's body in the region of the hip and leg with nerve involvement, extreme pain and suffering and a severe shock to his nervous system.

VII.

That at the time of the happening of the aforesaid accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately Three Hundred Dollars (\$300.00) per month; that by reason of the carelessness and negligence of defendant, as aforesaid, and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future, rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of Court to insert said sum as the reasonable value of said loss of services.

VIII.

That as a direct and proximate result of the carelessness and negligence of defendant, as aforesaid, plaintiff has been generally damages in the sum of Fifty Thousand Dollars (\$50,000.00).

Wherefore, plaintiff prays judgment against defendant in the sum of Fifty Thousand Dollars (\$50,000.00) together with such special damages as may be hereafter ascertained and for his costs of suit incurred herein.

HILDEBRAND, BILLS & McLEOD

By C. McLeod

Attorneys for Plaintiff [4]

[Verified.]

[Endorsed]: Filed May 7, 1947. [5]

[Title of District Court and Cause]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Hildebrand, Bills & McLeod, plaintiff's attorneys, whose address is 1212 Broadway, Oakland 12, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

EDMUND L. SMITH

Clerk of Court

By Charles A. Seitz

Deputy Clerk

Date: May 7, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [6]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 14th day of May, 1947, I received the within summons and complaint and served the same on Southern Pacific Co. by serving Roy G. Hiliebrand as Secretary at San Francisco, California, on the 14th day of May, 1947.

GEORGE VICE

United States Marshal

By.....

Deputy United States Marshal

Marshal's Fees

Travel..... \$.20

Service..... 2.00

2.20

Subscribed and sworn to before me, a
this day of 19 .

(Seal)

HERBERT R. COLE

[Endorsed]: Filed May 16, 1947. [7]

[Title of District Court and Cause]

ANSWER OF DEFENDANT SOUTHERN PACIFIC COMPANY AND DEMAND FOR JURY TRIAL

Comes now the defendant Southern Pacific Company, a corporation, and answering plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits each and every allegation contained in paragraphs I, II, III and IV, of plaintiff's complaint.

II.

Admits that at the time and place in said complaint alleged, it was the duty of the defendant Southern Pacific Company, a corporation, to furnish the plaintiff with reasonably safe equipment with which to perform his work.

III.

Denies generally and specifically each and every allegation contained in plaintiff's complaint not expressly admitted to be true [8] or denied for lack of knowledge, information or belief sufficient to enable it to answer in respect thereto.

IV.

Denies that by reason of any act or acts, fault, carelessness, omission or omissions upon the part of this answering defendant, its agents, servants or employees, that plaintiff William K. Carson sustained injuries or damages in the sum of Fifty Thousand Dollars (\$50,000.00), or any other sum whatsoever, whether as alleged in plaintiff's complaint or otherwise or at all.

For a Second, Separate and Distinct Answer and Defense, This Answering Defendant Alleges:

That the plaintiff William K. Carson did not exercise ordinary care, caution or prudence in the premises to avoid said accident and for his own safety, and that the said accident and resultant injuries or damages, if any, by him sustained were proximately contributed to and caused by the failure of plaintiff to exercise ordinary care, caution or prudence in the premises to avoid said accident and for his own safety in the premises.

For a Third, Separate and Distinct Answer and Defense, This Answering Defendant Alleges:

That at the time of the injuries alleged in plaintiff's complaint, plaintiff was an employee of this answering defendant and was engaged in performing ordinary duties in connection with such employment as brakeman; that at the time of the alleged injuries as hereinbefore alleged, plaintiff assumed the hazards ordinarily incident to the duties to be performed by him in connection with his employment as a brakeman, and the injuries, if any, or damages, if any, by plaintiff sustained arose solely from the hazards which were ordinarily incident to the performance of plaintiff's duties as said employee, which hazards or dangers were apparent to plaintiff and anticipated by him prior to the time he commenced and during the time he was performing said duties, and which ordinary hazards by [9] reason of said facts were assumed by plaintiff at the time of the alleged injuries.

For a Fourth, Separate and Distinct Answer and Defense. This Answering Defendant Alleges:

That at the time of the accident alleged in plaintiff's complaint defendant furnished to plaintiff for use in per-

forming his duties a hardwood brake club of standard make and design, of a type in general use for the purpose intended, and manufactured by a reputable manufacturer; that at the time said brake club was furnished to plaintiff there was nothing about said club to indicate that it was in any way defective and that the defects, if any, in said club were latent and unknown to defendant and could not have been discovered by defendant by the use of ordinary care.

Wherefore, this answering defendant prays judgment for its costs.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT

By O. O. Collins

Attorneys for Defendant Southern Pacific
Company

Defendant Southern Pacific Company hereby demands a jury trial in the within matter.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT

By O. O. Collins

Attorneys for Defendant Southern Pacific
Company [10]

[Verified.] [11]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 3, 1947. [12]

[Minutes: Thursday, August 14, 1947]

Present: The Honorable Leon R. Yankwich for Paul J. McCormick, District Judge.

Setting for jury trial: Both Goodman, Esq., for plaintiff; John Allport, Esq., for defendant; Court orders trial set before Judge Ling on Aug. 27, 1947. [13]

[Title of District Court and Cause]

NOTICE OF TRIAL

To the Plaintiff Above Named, and to Hildebrand, Bills and McLeod, His Attorneys:

You, and Each of You, Will Please Take Notice that the above entitled matter has been set for trial by jury on the 27th day of August, 1947, at 10:00 A. M., in the District Court of the United States in and for the Southern District of California, Central Division, Judge Charles C. Cavanah, Presiding.

Dated: August 15, 1947.

C. W. CORNELL

O. O. COLLINS

MALCOLM ARCHBALD

JOHN R. ALLPORT

By John R. Allport

Attorneys for Defendant Southern Pacific
Company [14]

Received copy of the within Notice of Trial this 18th day of August, 1947. Hildebrand, Bills and McLeod, by John M. Ennis, ea, Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 18, 1947. [15]

[Minutes: Wednesday, August 27, 1947]

Present: The Honorable Chas. C. Cavanah, District Judge.

For jury trial; D. W. Brobst, Esq., for plaintiff; O. O. Collins, Esq., for defendant; Court orders that a jury be impaneled for this trial and clerk draws names of twelve jurors who take places in jury box, and are informed of the facts of the case by Attorney Brobst and examined for cause by the Court and Attorney Collins.

Frank Harold Lonsdale is excused by plaintiff and clerk draws name of Jos Patrick Quigley, who is examined for cause by the Court.

Robert Tufts Cass is excused by plaintiff and clerk draws name of Mary M. Long, who is examined for cause by the Court.

There being no further challenges the jurors now in the box are accepted and sworn as the jury for the trial of this cause, viz.:

THE JURY

- | | |
|----------------------------|----------------------------|
| 1. Thos. Henry Sanders | 7. Agnes Margaret Williams |
| 2. Norman J. Adams | 8. Allan Douglas Bryan |
| 3. Geo. Christian Blessing | 9. Wm. S. Davis |
| 4. Agnes White Roberts | 10. Glen Moore |
| 5. Ola J. Kerns | 11. Mary M. Long |
| 6. Jos. Patrick Quigley | 12. Martin Ernest Hall |

Court orders that petit jurors present who were not impaneled for this trial are excused until notified.

Attorney Brobst, at 10:28 A. M., makes a statement to jury for plaintiff; and Attorney Collins at 10:30 A. M., makes opening statement to jury for def't.

Wm. Kent Carson, plaintiff, at 10:32 A. M., is called, sworn, and testifies for himself. Plf's Ex. 1 is admitted in evidence.

At 11:15 A. M. the Court admonishes the jury not to discuss this cause and declares a recess for 10 minutes.

At 11:30 A. M. court reconvenes herein and all being present as before, including the jury, Wm. Kent Carson, plaintiff, resumes the stand and testifies further. [16]

Daniel J. Byrne, Jr., at 11:37 A. M., is called, sworn, and testifies for plaintiff, and at 11:44 A. M., Volney C. Barnett is called, sworn, and testifies for plaintiff. At 11:48 A. M. court recesses until 2 P. M.

At 2 P. M. court reconvenes herein and all being present as before, including the jury, Court orders trial proceed.

Wilson D. Jacobs, at 2:01 P. M., is called, sworn, and testifies for plaintiff; and at 2:17 P. M. Dr. Chester Cornell McReynolds is called, sworn, and testifies for plaintiff.

At 2:45 P. M. Dr. Ross Sutherland is called, sworn, and testifies for defendant. At 3 P. M. court recesses for 10 minutes.

At 3:10 P. M. court reconvenes herein and all being present as before, including the jury, Volney C. Barnett, heretofore sworn, resumes the stand and testifies further. At 3:16 P. M. plaintiff rests.

Robert Adam Graham, at 3:18 P. M., is called, sworn, and testifies for defendant. Attorney Collins argues a point of law, Attorney Brobst argues a point of law, and Attorney Collins argues further.

At 3:42 P. M. the jury return into court and Court declares a recess in this trial until Aug. 28, 1947, at 10 A. M. [17]

[Minutes: Thursday, August 28, 1947]

Present: The Honorable Chas. C. Cavanah, District Judge.

For further jury trial; D. W. Brobst, Esq., for plaintiff; C. O. Collins, Esq., for defendant; jury present;

Court makes a statement re offer of proof.

Kenneth W. Knight is called, sworn, and testifies.

Robert Adam Graham, heretofore sworn, testifies further.

Deft's Ex. A, B, and C are admitted in evidence.

Leslie Arthur Estes is called, sworn, and testifies for defendant.

At 10:47 A. M. court recesses for ten minutes.

At 10:55 A. M. court reconvenes herein and all present as before, jury present, Court orders trial proceed. Defendant rests at 11:02 A. M. Plaintiff has no rebuttal.

Attorney Brobst argues to jury for plaintiff, Attorney Collins argues to jury for defendant in reply, and Attorney Brobst argues in reply.

At 11:45 A. M. Court admonishes the jury and declares a recess in this trial to 10 A. M., Aug. 29, 1947. [18]

[Title of District Court and Cause]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S
REQUESTED INSTRUCTIONS

I.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction or any request to the Court to instruct the Jury where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers Liability Act requires plaintiff's contributory negligence be disregarded, for the reason that the instruction is not supported by any evidence or the pleadings that there was any violation of the Safety Appliance Act and assumes and decides as a matter of law that there was a violation of the Safety Appliance Act.

[Written]: Denied. Charles C. Cavanah, Judge.

II.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction wherein the plaintiff requests the Court to instruct the Jury that it was the duty of the defendant [19] to provide employees a reasonably safe place within which to work, for the reason that the issue is not involved nor is it supported by any evidence.

[Written]: Denied. Charles C. Cavanah, Judge.

III.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction quoting Sec. 51, Title 45—U. S. C. A., commencing with the phrase

“Every common carrier by railroad” and ending with the phrase “roadbed, works, boats, wharves, or other equipment” because it fails to take into consideration the question of contributory negligence (comparative negligence).

[Written]: Denied. Charles C. Cavanah, Judge.

IV.

Defendant Southern Pacific Company, a corporation, objects to plaintiff’s unnumbered instruction wherein plaintiff requests instruction under the Federal Safety Appliance Act instructing the Jury it was an absolute duty to equip its cars with hand brakes and appliances, etc. and that such duty is absolute regardless of negligence on the part of the railroad company or negligence on the part of the plaintiff, for the reason that a violation of the Federal Safety Appliance Act is not involved nor is it supported by either the evidence or the pleading.

[Written]: Denied. Charles C. Cavanah, Judge.

V.

Defendant Southern Pacific Company, a corporation, objects to plaintiff’s unnumbered instruction involving the Safety Appliance Act wherein plaintiff requests the Court again to instruct the Jury under the Safety Appliance Act with reference to the equipment they work with, efficient hand brakes, for the reason that there is no evidence to support such instruction nor is it supported by the pleading.

[Written]: Denied. Charles C. Cavanah, Judge.

VI.

Defendant Southern Pacific Company, a corporation, objects, to plaintiff’s unnumbered instruction based on the

Safety Appliance Act wherein plaintiff requests Court to instruct the Jury that the [20] defendant was absolutely bound to keep and maintain the hand brakes in an efficient condition at all times, for the reason there is no evidence to support such an instruction nor is it supported by the pleadings.

[Written]: Denied. Charles C. Cavanah, Judge.

VII.

Defendant Southern Pacific Company, a corporation, objects to plaintiff's unnumbered instruction, last and final, wherein plaintiff requests the Court to instruct the Jury with reference to the Statute under the Federal Safety Appliance Act relating to hand brakes on railroad cars, for the reason that there is no evidence to support such instruction nor is it supported by the pleadings.

[Written]: Denied. Charles C. Cavanah, Judge.

Generally, defendant Southern Pacific Company, a corporation, objects to any instruction under the Safety Appliance Act requested by plaintiff, all of which are unnumbered, for the reason that the action is brought solely under the Federal Employers Liability Act, and that a brake club or brake stick is not an instrumentality coming under the Safety Appliance Act.

[Written]: Denied. Charles C. Cavanah, Judge.

C. W. CORNELL

O. O. COLLINS

MALCOLM ARCHBALD

JOHN R. ALLPORT

By O. O. Collins

Attorneys for Defendant Southern Pacific
Company

[Endorsed]: Filed Sep. 10, 1947. [21]

[Title of District Court and Cause]

DEFENDANT'S REQUESTED INSTRUCTIONS

Comes now the defendant Southern Pacific Company, a corporation, and requests the Court to instruct the jury as follows: [22]

Defendant's Instruction No. I

The Court instructs the jury to find the issues in favor of and return a verdict in favor of the defendant, the Southern Pacific Company.

Given:

Given as Modified:

Refused: Refused

Charles C. Cavanah, Judge [23]

Defendant's Instruction No. II

In case the Court refuses to give the foregoing instruction, then and in that event only, defendant requests each of the following instructions.

Given:

Given as Modified:

Refused: Refused

Charles C. Cavanah, Judge [24]

Defendant's Instruction No. III

The instructions which I am about to read to you are the instructions of the Court and you are expected and required under the law to follow the same. It is your duty to consider, not one of these instructions, but all of them together, and to construe them together for the purpose of definitely ascertaining the law upon the ques-

tions now submitted to you. It is further the duty of the Court to instruct you upon all phases of the law which apply to any fact or circumstances which is in evidence and upon which you may find, regardless of what the Court thinks the weight of evidence shows.

You are the sole and exclusive judges of what the facts are. It is for you to judge of the credibility of the witnesses and to determine what the truth is. Having ascertained what the facts are, it is further your duty then to arrive at your verdict in accordance with that law and those facts, without passion, or prejudice, speculate or sympathy for either party.

Given: Covered in general instruction

Given as Modified:

Refused:

Charles C. Cavanah, Judge [25]

Defendant's Instruction No. XI.

You are instructed that reasonable care in the matter of inspection requires the defendant to make such examinations and tests as a reasonably prudent man would deem necessary under the same or similar circumstances for the discovery of defects. The defendant is not required, unless put upon notice as to any probable existence of defects, to employ unusual or extraordinary tests, nor even to use the latest and most improved methods of testing its tools. If you believe from the evidence that the Southern Pacific Company used the same degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercised under like circumstances in the inspection of its tools, then, and in that event, I

instruct you that the Southern Pacific Company is not guilty of any actionable negligence and your verdict should be for the defendant. [Written]: Out.

39 C. J. 424, 425, Sections 541, 542;

Canadian Northern Ry. Co. v. Senske, 201 F. 637;

Lowden v. Hanson, 134 F. (2d) 348;

Siegel v. Detroit, G. H. & M. R. Co., 160 Mich. 270; 125 N. W. 6;

Stoutimore v. Atchison, T. & S. F. R. Co., 338 Mo. 463; 92 S. W. (2d) 658;

35 Am. Juris. 573, Sec. 141;

Lowden v. Hanson, 134 F. (2d) 348.

Given:

Given as Modified: ✓

Refused:

Charles C. Cavanah, Judge [26]

Defendant's Instruction No. XII

You are instructed that the defendant, the Southern Pacific Company, is not liable for those risks which it could not avoid in the observance of its duty of due care.

In applying the above principle in this case, while it is true that the plaintiff did not assume the risks of danger in his employment, nevertheless, he can only recover in this case by proving by a preponderance of the evidence that the defendant, the Southern Pacific Company, through its agents, servants, or employees, was guilty of negligence, which, in whole or in part, proximately caused the accident and any injuries or damages resulting therefrom, and if you find from a preponderance

of the evidence that the dangers, if any, to which the plaintiff was subjected, and which caused his injuries, if any, could not have been avoided by the defendant, the Southern Pacific Company, in the exercise of reasonable care, then the plaintiff is not entitled to recover against the defendant, and you should return a verdict in favor of the defendant.

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54-73; 87 L. Ed. 610.

Given:

Given as Modified:

Refused: Refused

Charles C. Cavanah, Judge [27]

Defendant's Instruction No. XIII

You are instructed that the defendant is not an insurer of the safety of its employees, ~~and that before the plaintiff can recover in this case, he must prove by a preponderance of the evidence that the defendant has been guilty of negligence that proximately contributed to his accident and any damages sustained by him.~~
[Written]: Out.

Given:

Given as Modified: As modified

Refused:

Charles C. Cavanah, Judge [28]

Defendant's Instruction No. XV

You are instructed that the term "latent defect" means a defect that is not visible or apparent; a hidden defect; it applies to that which is present without manifesting itself; ~~it cannot be discovered by mere observation.~~
[Written]: Out.

Given:

Given as Modified: As modified

Refused:

Charles C. Cavanah, Judge [29]

Defendant's Instruction No. XVI

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he or she has failed to fulfill his or her burden of proof. ~~To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent, or if it was, its negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established.~~
[Written]: Out.

B. A. J. I. No. 132, Third Revised Edition.

Given:

Given as Modified: As modified

Refused:

Charles C. Cavanah, Judge [30]

Defendant's Instruction No. XXI

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it. [Written]: Out.

B. A. J. I., Third Revised Edition No. 134.

Given:

Given as Modified: As modified

Refused:

Charles C. Cavanah, Judge [31]

Defendant's Instruction No. XXII

You are instructed that in civil cases, such as this is, a preponderance of the evidence is required in order for the plaintiff to be entitled to recover; i. e., such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests. The burden of proof rests upon the plaintiff to prove and establish all of the controverted material allegations of his complaint by a preponderance of the evidence; and if you find that the plaintiff has not sustained this burden of proof or if you find that the evidence is evenly balanced or that it preponderates

in favor of the defendant, the Southern Pacific Company, then the plaintiff cannot recover from the defendant, the Southern Pacific Company, and in such case your verdict will be in favor of the defendant.

[Written]: Out.

Given:

Given as Modified: As modified

Refused:

Charles C. Cavanah, Judge [32]

Defendant's Instruction No. XXIII

You are instructed that you may not speculate as to whether the defendant, the Southern Pacific Company, was negligent with respect to any matters shown in connection with the alleged injury to plaintiff; but such negligence, if any, must be proved by the plaintiff by a preponderance of the evidence, and if the evidence leaves the real cause of the alleged injuries to plaintiff as a matter of conjecture or doubt, then your verdict shall be in favor of the defendant and against the plaintiff.

Patton v. Texas R. Co., 179 U. S. 655; 45 L. Ed. 361;

Shaff v. Perry, 232 Pac. 407.

Given:

Given as Modified:

Refused: Refused

Charles C. Cavanah, Judge [33]

Defendant's Instruction No. XXIV

You are instructed that if you believe from the evidence that the brake club in question was purchased from a reputable manufacturer then the railroad company cannot be charged with negligence because of any structural or inherent defects which was not patent at the time the club was delivered to the plaintiff for his use.

Lowden v. Hanson, 134 F. 2d 348, 351.

Given:

Given as Modified:

Refused: Refused

Charles C. Cavanah, Judge [34]

Defendant's Instruction No. V-A

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. (Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.)

[Written]: Given as modified. Charles C. Cavanah.

See other offered

Given:

Given as Modified: ✓

Refused:

Charles C. Cavanah, Judge [35]

Defendant's Instruction No. V-D

You are instructed that it was the duty of the railroad company to use ordinary care in the selection and purchase of brake clubs to be furnished to its employees.

If you find from the evidence that such care was used with respect to the brake club involved in this accident, then it was not negligent in this respect.

Given:

Given as Modified:

Refused:

Charles C. Cavanah, Judge [36]

Defendant's Instruction No. V-E

The evidence in this case established that the brake clubs are furnished to its employees by the defendant company. Under such circumstances it was the company's duty to use ordinary care in the examination and inspection of the clubs before they were made available.

If you believe from the evidence that the railroad company used such care with respect to the brake club involved in this accident, then it was not negligent in this respect.

Given:

Given as Modified:

Refused:

Charles C. Cavanah, Judge [37]

Defendant's Instruction No. IX (a)

You are instructed that if you believe from the evidence that the brake club used by the plaintiff was purchased by the Southern Pacific Company from a manu-

facturer of recognized standing then it had the right to assume that in the manufacture thereof proper care was taken and that proper tests were made and that as delivered to the Southern Pacific Company it was in a fair and reasonable condition for use.

Richmond and Danville Railroad Company, plaintiff in error, vs. Henry Elliott, 149 U. S. 265, 266 at 273.

37 Law Edition, 728 at 732.

Lowden v. Hanson, 134 F. 2d 348, 351.

[Written]: Refused

Charles C. Cavanah, Judge

Given:

Given as Modified:

Refused: Refused

Charles C. Cavanah, Judge [38]

Def. Requested Ins. No. 9, B

You are instructed that one who purchases an instrumentality from a manufacturer of recognized standing then he has the right to assume that in the manufacture thereof proper care was taken and proper tests were made and that when it was delivered it was in a fair and reasonable condition for use unless there was some apparent patent defect in the instrumentality which reasonable inspection ^{or} ~~and~~ test would disclose.

Refused

Charles C. Cavanah, Judge

[Endorsed]: Filed Sep. 10, 1947. [39]

[Minutes: Friday, August 29, 1947]

Present: The Honorable Chas. C. Cavanah, District Judge.

For further jury trial; D. W. Brobst, Esq., for plaintiff; O. O. Collins, Esq., for defendant; and jury being present; Court instructs the jury on the law. At 10:55 A. M. Frank Mefferd is sworn as an officer to take charge of the jury during its deliberation upon a verdict and the jury retires to deliberate.

Thereupon, counsel for both sides confirm objections previously taken to ruling of Court, declining to give instructions requested, and giving instructions objected to; and both sides agree that verdict may be received in the absence of counsel, and that in the event verdict is rendered in favor of the plaintiff, that defendant be allowed a stay for 10 days after entry of judgment; or 10 days after ruling of Court denying motion for a new trial if said motion is made.

At 11:42 A. M. Court orders that the jury be taken to lunch at noon, if they so desire, without any further order of Court.

At noon Frank Turner is also sworn as an officer to take charge of the jury, and the jury in company of both officers go to lunch.

At 2 P. M. jury return and resumes deliberation.

At 3 P. M. jury return into court and plaintiff being present, his attorney being absent, and counsel for defendant being present; jury presents verdict which is read and ordered filed and entered herein, to-wit:

[Title of District Court and Cause]

VERDICT OF THE JURY

We, the jury in the above entitled case, find the issues in favor of the plaintiff, and assess his damages in the sum of Eighty Five Hundred Dollars (\$8,500).

Dated: Los Angeles, Calif., August 29th, 1947.

GLEN MOORE

Foreman of the Jury

[Endorsed]: Filed Aug. 29, 1947. [41]

In the District Court of the United States for the
Southern District of California
Central Division

No. 6950-M

WILLIAM K. CARSON,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

JUDGMENT

This cause came on for trial before the court and a

27

jury on August 29th, 1947, both parties appearing by counsel, and the issues having been duly tried, and the Jury having rendered a verdict for the plaintiff.

It Is Hereby Ordered, Adjudged and Decreed that plaintiff have judgment against the defendant in the sum

of Eight Thousand Five Hundred (\$8,500.00) Dollars, together with costs herein taxed at \$76.40.

Dated: This 4th day of September, 1047.

CHARLES C. CAVANAH

Judge of the ~~Superior Court~~ United States
District Court

Approved as to Form: Cornell, Collins, Archbald & Allport, by O. O. Collins, Attorneys for Defendant.

Judgment entered Sep. 4, 1947. Docketed Sep. 4, 1947. C. O. Book 45, page 271. Edmund L. Smith, Clerk; by J. M. Horn, Deputy. [42]

Received copy of the within Judgment this 3rd day of September, 1947. C. W. Cornell, by ARH, Attorney for Defendant.

[Endorsed]: Filed Sep. 4, 1947. [43]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now the defendant and moves the Court for a new trial of the above entitled action upon the following grounds:

1. Errors in law occurring at the trial.
2. Insufficiency of evidence to justify the verdict as a whole.
3. Insufficiency of the evidence to justify the amount of the verdict.

The errors relied upon in support of this motion are as follows:

(a) The Court erred in charging the Jury at the request of plaintiff in the three following instructions as follows. If you find from a preponderance of the evidence that the hand brake on the tank car in question would not operate efficiently without the use of a [44] brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions.

(b) Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded.

(c) The Federal Safety Appliance Act imposes upon the railroad carrier an absolute duty to equip its cars with hand brakes and appliances prescribed in the Act and to equip and maintain such hand brakes in an efficient condition; and the liability for failure to maintain efficient hand brakes is absolute, regardless of negligence on the part of the railroad company or contributory negligence on the part of the plaintiff.

(d) And the Court erred in modifying the defendant's requested Instruction No. XI, the Instruction as requested, is as follows: "You are instructed that reasonable care in the matter of inspection requires the defendant to make such examinations and tests as a reasonably prudent man would deem necessary under the same or similar circumstances for the discovery of defects. The defendant is not

required, unless put upon notice as to any probable existence of defects, to employ unusual or extraordinary tests, nor even to use the latest and most improved methods of testing its tools. If you believe from the evidence that the Southern Pacific Company used the same degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercised under like circumstances in the inspection of its tools, then, and in that event, I instruct you that the Southern Pacific Company is not guilty of any actionable negligence and your verdict should be for the defendant."

The Instruction as modified and given by the Court: [45] "If you believe from the evidence that the Southern Pacific Company used the same degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercised under like circumstances in the inspection of its tools, then, and in that event, I instruct you that the Southern Pacific Company is not guilty of any actionable negligence and your verdict should be for the defendant."

(e) The Court also erred in refusing to give the following Instruction requested by the defendant. You are instructed that one who purchases an instrumentality from a manufacturer of recognized standing then he has the right to assume that in the manufacture thereof proper care was taken and proper tests were made and that when it was delivered it was in a fair and reasonable condition for use unless there was some apparent patent defect in the instrumentality which reasonable inspection and test would disclose.

(f) That the Court erred in giving the following instruction upon its own initiative:

“You are further instructed that one who purchases an instrumentality from a manufacturer is justified in assuming that in the manufacture thereof proper care was taken and proper tests were made of the different parts of the instrumentality and that as delivered to him it is in a fair and reasonable condition for use, but it is never the duty of a purchaser not to make tests or examination of his own or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested it.”

This motion is based upon the pleadings and papers on file, the minutes of the Court, the reporter's shorthand notes or transcript thereof, and upon the entire record in the case.

Dated this 5th day of September, 1947.

C. W. CORNELL
O. O. COLLINS
MALCOLM ARCHBALD
JOHN R. ALLPORT

By O. O. Collins

Attorneys for Defendant Southern Pacific
Company [46]

Received copy of the within Motion for New Trial this 5th day of September, 1947. Hildebrand, Bills and McLeod, by John M. Ennis, Per F., Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 5, 1947. [47]

[Minutes: Wednesday, September 10, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

For hearing defendant's motion for new trial, filed Sept. 5, 1947; D. W. Brobst, Esq., for plaintiff; O. O. Collins, Esq., for defendant;

Attorney Collins presents said motion and Attorney Brobst replies to it.

Court orders said motion denied. Defendant notes an exception to the ruling. [48]

[Title of District Court and Cause]

NOTICE OF DENIAL OF MOTION FOR
NEW TRIAL

To the Above Named Defendant, and C. W. Cornell, O. O. Collins, Malcolm Archbald and John R. Allport, Attorneys for Defendant:

You are hereby notified that on the 10th day of September, 1947, the above entitled court made its order denying the defendant's Motion for New Trial.

Dated: September 17th, 1947.

HILDEBRAND, BILLS & McLEOD

By [Illegible]

Attorneys for Plaintiff [49]

Received copy of the within this 19 day of September, 1947. C. W. Cornell, /J.C., Attorney for Defendant.

[Endorsed]: Filed Sep. 19, 1947. [50]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that the above named defendant Southern Pacific Company, a corporation, hereby appeals to the United States Circuit Court of Appeals for the Ninth (9th) Circuit from the final judgment and the whole thereof entered in this court on or about the fourth (4th) day of September, 1947.

C. W. CORNELL

O. O. COLLINS

MALCOLM ARCHBALD

JOHN R. ALLPORT

By John R. Allport

Attorneys for Defendant Southern Pacific
Company

Received copy of the within Notice of Appeal this 20 day of Sept., 1947. John M. Ennis, Attorney for Plaintiff.

[Endorsed]: Filed Sep. 22, 1947. [51]

[Title of District Court and Cause]

STIPULATION WAIVING BOND ON APPEAL

It Is Hereby Stipulated that bond on appeal (cost bond) Rule 73C and supersedeas bond (stay of execution bond on appeal), Rule 73D, is hereby waived.

That execution on the judgment entered in the above entitled matter is the sum of \$8,500.00 and costs shall be stayed during the pendency of and until the final determination of the appeal in the above entitled matter.

This stipulation is made and entered into in lieu of the posting of any bond or bonds by the defendant Southern Pacific Company, a corporation, provided for under Federal Rules of Procedure, Title 28, Rule 73C and Rule 73D or otherwise.

HILDEBRAND, BILLS & McLEOD

By John M. Ennis

Attorneys for Plaintiff

C. W. CORNELL

O. O. COLLINS

MALCOLM ARCHBALD

JOHN R. ALLPORT

By John R. Allport

Attorneys for Defendant Southern Pacific
Company

[Endorsed]: Filed Sep. 22, 1947. [52]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 57, inclusive, contain full, true and correct copies of Complaint for Damages; Summons and Return of Service; Answer of Defendant Southern Pacific Company and Demand for Jury Trial; Minute Order Entered August 14, 1947; Notice of Trial; Minute Orders Entered August 27 and 28, 1947; Defendant's Objections to Plaintiff's Requested Instructions; Defendants Requested Instructions Refused or Modified; Minute Order Entered August 29, 1947; Verdict of the Jury; Judgment; Motion for New Trial; Minute Order Entered September 10, 1947; Notice of Denial of Motion for New Trial; Notice of Appeal; Stipulation Waiving Bond on Appeal; Designation of Record and Affidavit of Service which, together with copy of reporter's transcript of proceedings on August 27, 28 and 29, 1947 and original plaintiff's exhibit 1 and original defendant's exhibits A, B, and C, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$15.50 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28 day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke,
Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Charles C. Cavanah, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, August 27, 28, 29, 1947

Appearances:

For the Plaintiff: Hildebrand, Bills & McLeod, 1212 Broadway, Oakland 12, California; by D. W. Frost, Esq.

For the Defendant: O. O. Collins, Esq., 670 Pacific Electric Building, Los Angeles 14, California.

Los Angeles, California; August 27, 1947;
10:00 O'Clock A. M.

The Court: Are you ready in the case set for this morning?

Mr. Brobst: Yes, your Honor.

Mr. Collins: Yes, your Honor.

The Court: You may call the jury.

(At this point the following jury of 12 were duly impaneled and sworn:)

- | | |
|------------------------------|----------------------------|
| 1. Thomas Henry Sanders | 7. Agnes Margaret Williams |
| 2. Norman J. Adams | 8. Allan Douglas Bryan |
| 3. George Christian Blessing | 9. William S. Davis |
| 4. Agnes White Roberts | 10. Glen Moore |
| 5. Ola J. Kerns | 11. Mary M. Long |
| 6. Joseph Patrick Quigley | 12. Martin Ernest Hall |

The Court: You may make an opening statement.

Mr. Collins: Your Honor, I would like to invoke the rule that all witnesses be excused from the courtroom until the time they are called to testify.

The Court: All witnesses in the case on either side are excused from the courtroom until you are called as witnesses until the evidence is closed.

OPENING STATEMENT IN BEHALF OF THE PLAINTIFF

Mr. Brobst: If the Court please, and ladies and gentlemen- [4*] men of the jury: This is an action brought by the plaintiff under what is known as the Federal Employers Liability Act. The evidence will show that the plaintiff was employed by the defendant Southern Pacific Company and at the time of his accident or injury he was working out in their yards in Tucson, Arizona. They were at that time making a switching movement. I presume that is what it will be. What they were doing was taking cars off from a train and putting them on a track. It was the plaintiff's duty to go in and set the brakes so that these cars would remain stationary. Then they would go out and get some more cars and bring them in, and he would set the brakes so that that cut of cars would remain stationary. I believe in railroad terms, the evidence will show, they call it tying down the cars.

At any rate, the plaintiff in this particular instance was riding in a cut of cars and it was his duty to tie down the cars, and the particular type of brake that he was operating, although it was a hand brake, he was required to use a club to set it. They call it a brake club. It will be described to you more in detail from the witness stand.

*Page number appearing at top of page of original Reporter's Transcript.

Now these brake clubs are supplied to these men working on these cars by the supply department of the Southern Pacific Company. I believe the evidence will show that they have a can that sits outside the supply department and when the men need a club they go out and select one out of the can and [5] go out and do their work. As I say, although these brakes are what are known as hand brakes, they require a club to operate them.

On this particular occasion, as this man was setting the hand brake, the club just broke right in half and it threw him around against the end of the car and he received an injury to his back, which will be described to you by the medical men.

I believe that the evidence will show that there was an injury in the vicinity of his fifth lumbar and also to the muscles in his back, the fifth lumbar vertebrae. This injury to his back has caused him trouble ever since the time of his accident, and although he has gone back to work he has only been able to work intermittently, or two or three days at a time and then he has to lay off because of this injury to his back.

The accident happened back in February of this year and he has lost completely a total of approximately six months of work.

The Court: You may proceed.

Mr. Collins: Do you wish a statement from the defense?

The Court: I will leave that with you. You can make it now or you can make it later on.

Mr. Collins: I think I had better make it now.

The Court: Very well. [6]

OPENING STATEMENT ON BEHALF OF
THE DEFENDANT

Mr. Collins: Ladies and gentlemen of the jury: There isn't any question but what the brake club broke. I have it here in court. I expect to show from the evidence that these brake clubs are purchased from a reputable firm, a firm which is engaged in the manufacture of brake clubs.

I expect to show you that the brake club when received by us had the usual inspection, that the brake club itself shows no flaws whatsoever, that the brake club could not have been broken except by the exertion of a force upon the brake club which was abnormal. The brake club has been tested, showing what the tensile strength is, and that it was bought from a reputable firm which, if you believe, the Court will in all probability say to you that that is a defense to this action.

The Court: You may proceed.

Mr. Brobst: Mr. Carson.

WILLIAM KENT CARSON,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: William Kent Carson.

Direct Examination

By Mr. Brobst:

Q. While you are up there, Mr. Carson, just speak up [7] so that all the jurors and the judge can hear.

What is your name, please?

A. William Kent Carson.

Q. Where do you live, Mr. Carson?

A. 114 North Jacobus, in Tucson, Arizona.

(Testimony of William Kent Carson)

Q. How old are you, Mr. Carson?

A. Twenty-five.

Q. Now back in February of this year. what was your business or occupation?

A. Yardman.

Q. For what company were you employed?

A. Southern Pacific.

Q. How long had you been working for them prior to the second day of February of this year?

A. A little over two years.

Q. What are the duties generally of a yardman?

A. There is all different things; you use them as headers and they switch cars out.

Q. You do general switching work in the yard, is that about what it covers?

A. Yes, sir.

Q. What was the date that the accident in which you received your injury occurred?

A. February 2nd.

Q. Of what year? [8]

A. 1947.

Q. Where did that accident take place?

A. Tucson, Arizona.

Q. In what yard there?

A. North yard.

Q. What time did you come to work the day of the accident?

A. 7.59.

Q. In the morning?

A. Yes, sir.

Q. What time did the accident occur?

A. About 10:50.

Q. That was also in the morning?

A. Yes, sir.

Q. What type of work were you doing at the time that the accident happened?

A. I was switching a cut of cars out.

Q. How many cars were there in the particular cut that you were switching?

A. Three cars.

(Testimony of William Kent Carson)

Q. What were the three cars, if you recall?

A. There was a boxcar and two tank cars.

Q. On which of the three cars were you riding?

A. I was riding the rear tank car.

Q. The rear tank car? [9] A. Yes, sir.

Q. What was the car that was furthest away from you? A. The boxcar.

Q. Then the next one towards you was what?

A. A tank car.

Q. Then the one you were on was also a tank car?

A. A tank car.

Q. What was your duty with relation to that particular cut of cars?

A. I was to ride the cut of cars in the clear and tie it down and see that it stayed there.

Q. What do you mean by tying it down?

A. I was to wind the brake up and see that the car stayed there on the track.

Q. On this particular car, what type of a brake was it? A. Staff brake.

Q. Is that what is called a hand brake?

A. That is a hand brake but you are required to use a club.

Q. It is a hand brake but you have to use a club?

A. Yes, sir.

Q. Now did you have a club with you that you were tying this car down with? A. Yes, sir.

Q. Where had you gotten that club? [10]

A. From the front of the yard office. They have a can in front of the yard office and I got it out of there.

Q. When had you gotten the club?

A. I got it that morning, 7:59, before I went to work.

(Testimony of William Kent Carson)

Q. Is that something that is necessary to have with you?
A. Yes, sir.

Q. Why?

A. That is a hill yard and you need a club to tie the brakes down.

Q. It was what kind of a yard?

A. It is a hill yard. There is a kind of a grade there and you need a club to tie the brakes down.

Q. Can you tie them securely enough by hand so that they will stay, or is it necessary to use this brake?

Mr. Collins: That is objected to as calling for a conclusion of the witness, unless he made an actual test.

The Court: That calls for a conclusion. Objection sustained. You are asking his opinion. Let him state the facts.

By Mr. Brobst:

Q. On this particular car, state whether or not it was necessary to use a club to hold the car fast.

Mr. Collins: Same objection, if your Honor please.

The Court: That calls for an opinion. He can state [11] what was done and describe everything there. You are asking him his opinion, counsel.

Mr. Brobst: I am asking him to state whether or not it was necessary.

Mr. Collins: That calls for an opinion. What did he do? Did he try it beforehand?

The Court: I am afraid that that calls for an opinion. He can state what the custom is. what they had been doing, and all that.

By Mr. Brobst:

Q. What were you using to make the brake hold?

A. A brake club.

(Testimony of William Kent Carson)

Q. Would the brake hold by the use of your hands?

A. No, sir.

Mr. Collins: That is objected to as calling for a conclusion and opinion of the witness. and I move that the answer be stricken.

The Court: Objection sustained. That is asking if a certain event would have happened if a certain thing was not done. That is calling for his opinion. He can state the facts as to what occurred and how it was done and he can leave that to the Court and jury whether it was necessary under the facts or whether it would not have happened.

By Mr. Brobst:

Q. Was the track that you were setting these cars out [12] on, was that a level track or was it on an incline? A. It was on a grade.

Q. Which way was the grade, in the direction in which the move was being made or was it back in the direction you were riding?

A. It was back in the direction from which I had been riding.

Q. So that the cars actually were to be tied down on a grade? A. Yes, sir.

Q. Now had you on previous occasions tied down cars that were set on that grade? A. Yes, sir.

Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.

Mr. Collins: Just a moment. I would like to ask a question on voir dire.

The Court: You may do so.

(Testimony of William Kent Carson)

Voir Dire Examination

By Mr. Collins:

Q. That was on different cars, not this particular car?

A. What is that?

The Court: He asked you what experience you have had in the past. Was it on different cars than this one that you [13] had that day?

The Witness: Yes. That is the first time I drove that car.

Mr. Collins: Objected to as incompetent, irrelevant and immaterial.

The Court: Did the cars you used on previous occasions, were they larger cars than the one on this occasion?

The Witness: Yes, sir.

The Court: Overruled.

Direct Examination (Continued)

Mr. Brobst: Will you read the question, Mr. Reporter?

(The question referred to was read by the reporter as follows):

(“Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.”)

The Witness: On some cars where they have a staff brake we have to use a brake club to hold the cars on the track.

The Court: This question comes after the Court had inquired. At the time it was asked him he hadn't made the facts known as to the Court's ruling to warrant the answer. But this question, as I understand, now comes in after he further testified when he was asked by the Court?

(Testimony of William Kent Carson)

Mr. Brobst: Yes, sir.

The Court: Let the record so show.

Mr. Brobst: Let the record show that the question was [14] re-propounded.

The Court: Any objection to that?

Mr. Collins: No objection.

Mr. Brobst: After the examination on voir dire.

The Court: Yes.

By Mr. Brobst:

Q. The particular type of brake that you were operating was a staff brake? A. Yes, sir.

Q. And in your past experience operating that type of brake on that particular track there, could you tie the cars down operating that brake by hand?

Mr. Collins: That is objected to on the ground it has been asked and answered. If I remember the answer correctly to the question that was re-propounded, he said that on some he did and on some he did not. If the reporter will read the answer I think you will find that that is correct.

(The record referred to was read by the reporter as follows):

("Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.

("A. On some cars where they have a staff brake we have to use a brake club to hold the cars on the track.")

The Court: He has answered it, counsel. Counsel has objected because it is repetition now. [15]

Mr. Brobst: I am asking the other way, whether or not they could be held by hand, that is all. It isn't repetition, your Honor.

The Court: Overruled. I see your point.

(Testimony of William Kent Carson)

The Witness: You mean the same cars?

By Mr. Brobst:

Q. The same type of brake.

A. With the same brake?

Q. Yes. A. No.

Q. Now as you attempted to tie down this car at this particular time, just tell what happened.

A. I was tying the brake down and the brake club broke and threw me against the end of the tank.

Q. Where did you say you got the brake club?

A. From the front of the yard office, the brake club can.

Q. Just describe the brake club if you will, please.

A. It is a piece of wood made out of hickory, about 32 inches long, and it is round at one end and it is tapered down at the other end.

Mr. Brobst: I believe counsel stated he had the brake club here. We could show it and the jury would get a better idea of it than to have him describe it.

Mr. Collins: Yes, I have it here. [16]

Mr. Brobst: Have you any objection to doing that?

Mr. Collins: Not at all. But before introducing it, I merely want to establish that it was that particular brake club.

Mr. Brobst: That is all right. I merely want to show what it looks like.

Mr. Collins: I think you will find the plaintiff's name inscribed on that brake club where he signed it after the accident.

Mr. Brobst: Do you want me to introduce it? I will ask him if it is.

Mr. Collins: Certainly.

(Testimony of William Kent Carson)

By Mr. Brobst:

Q. Is this the brake club that you were using the morning of the accident?

A. (Examining brake club). Yes, it is.

Mr. Collins: I think if you examine it you will find that there are four names appearing on it in addition to the plaintiff's.

Mr. Brobst: We will offer it in evidence, your Honor, at this time, eliminating the names that are written on it. I don't know what the purpose of those names is.

Mr. Collins: For the identification of the club as being the one that he was using.

Mr. Brobst: That is the one he was using, so that is [17] all right. We will offer it in evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 1 in evidence.

(The brake club referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

By Mr. Brobst:

Q. Now, Mr. Carson, you say it threw you around against the car when it broke? A. Yes, sir.

Q. And then what did you do?

A. After it threw me around?

Q. For instance, first what part of your body struck the tank car?

A. The lower left part of my back.

Q. Were you thrown to the ground?

A. No, sir.

Q. What did you do right after that, after it broke?

A. The foreman was there and I told him—he seen what happened and he asked me if I was hurt bad, and

(Testimony of William Kent Carson)

I told him I was hurting all over my back, I had a pain all over my back.

Q. Did you finish your shift? A. No, sir.

Q. Where did you take the brake club?

A. The foreman took it over to the general yard-master.

Q. Then did you go over to see the general yard-master? A. Yes, sir.

Q. From there where did you go? [18]

A. I went down to the Southern Pacific Hospital in Tucson, Arizona.

Q. How were you taken down there?

A. I was taken down there by a messenger.

Q. In an automobile? A. Yes, sir.

Q. Did you see a Southern Pacific doctor down there?

A. No, sir.

Q. Who did you see?

A. Not until the next day.

Q. The next day? A. Yes, sir.

Q. What did they do when you went to the hospital at Tucson the first time?

A. They took pictures of me.

Q. X-rays? A. They took X-rays.

Q. Did they give you any treatment at all?

A. No, sir.

Q. What did they do with you?

A. They told me to go home and come back the next day.

Q. What did you do when you went home?

A. I went home and went to bed.

Q. Did you go back to the hospital the next day?

A. Yes, sir. [19]

(Testimony of William Kent Carson)

Q. Did some company doctor then see you?

A. Yes, sir.

Q. What treatment, if any, did he give you?

A. He gave me physiotherapy and diathermy.

Q. Were you suffering any pain? A. Yes, sir.

Q. Where was that located?

A. It was located in the left part of my back.

Q. How long did you receive treatment from the doctor at Tucson?

A. On and off for about six months.

Q. About six months? A. Yes, sir.

Q. How often did you see the doctor at Tucson?

A. About once a week.

Q. Were you hospitalized at any time?

A. Only when I went over to San Francisco.

Q. That is what I am getting at. You were sent to what hospital?

A. San Francisco General Hospital.

Q. Is that the Southern Pacific General Hospital?

A. Southern Pacific General Hospital.

Q. When were you sent up there? A. In May.

Q. You were treated from February until May by the [20] local doctor at Tucson? A. Yes, sir.

Q. And then in May you were sent to the Southern Pacific General Hospital in San Francisco?

A. Yes, sir.

Q. How long were you there?

A. Three weeks.

Q. What type of treatment did they give you up there?

A. They gave me heat treatments and massage.

(Testimony of William Kent Carson)

Q. Were you able to do any work between the 2nd of February and up and through May when you were sent to the General Hospital?

Mr. Collins: That is objected to as calling for a conclusion of the witness. That is a matter calling for expert testimony. It is proper for him to say whether he did any work, or whether he did not, but as to his capabilities that is a matter of expert testimony.

Mr. Brobst: All right.

Q. Did you do any work? A. No, sir.

Q. Why not?

Mr. Collins: That is objected to on the ground it is calling for a conclusion of the witness unless it is limited to the question whether or not he suffered pain when he attempted to work. [21]

The Court: It is going into an opinion, bearing on an opinion about his condition. You can ask him what he did and how he operated.

Mr. Brobst: The question is why he didn't go back to work.

The Court: He may answer that.

The Witness: Because my back was hurting.

By Mr. Brobst:

Q. Just describe how your back hurts, if you will.

A. Well, it hurts whenever I lay down in a soft bed. A lot of times when I am standing up, I will be walking along and I will get a real sharp pain.

Q. How does that bother you when you perform your normal work as a yardman?

A. Most of the work is going up and down boxcars and walking all the time.

(Testimony of William Kent Carson)

Q. Now you were in the hospital for three weeks in San Francisco? A. Yes, sir.

Q. After you were up there, where did you go?

A. I come back to Tucson.

Q. Did you then attempt to go back to work?

A. Yes, sir.

Q. Just what happened when you went back to work?

A. My back started hurting worse and I had to lay off [22] a couple of days and I would go back to work and try it over again.

Q. Have you been doing that ever since May?

A. Ever since I come back from San Francisco.

Q. That would be about the 1st of June?

A. Yes, sir.

Q. About how many days a week do you average of work now? A. Last week I put in a full week.

Q. How is your back condition getting along now, is it improving? A. No, sir; it still hurts.

Q. But you do work nevertheless?

A. Yes, sir.

Q. Are you wearing any kind of a support on your back? A. No, sir.

Q. Was any prescribed by the hospital, by the doctors up in San Francisco? A. No, sir.

Q. Has any been prescribed by the doctor down at Tucson? A. No, sir.

Q. Now getting back to the time of the accident, Mr. Carson, just describe the force that you were using at the time the club broke. [23]

A. I was just using normal force, the same as I had used all morning, or that I used all the time.

(Testimony of William Kent Carson)

Q. Anything unusual that you were doing?

A. No, sir.

Q. Now when you selected this club from the can, state whether or not it was a used club or a new club.

A. It was a used club, it was almost new. I figured it was all right.

Q. But it had been used? A. Yes, sir.

Q. Approximately how much were you earning a month prior to the time the accident happened?

Mr. Collins: Can't we stipulate to that?

Mr. Brobst: Yes, if you have a year's earnings.

Mr. Collins: I think I have it for five or six months. I don't have a year's earnings. I assume that he averaged about the same, though, don't you?

Mr. Brobst: No. He was sick there about two months before the accident happened.

Mr. Collins: In August 1946 his total net earnings were \$344.64.

Mr. Brobst: May I look at it? There is some explanation about some of this.

Mr. Collins: That is his take-home pay that I was reading. [24]

Mr. Brobst: You haven't any for the six months prior to that?

Mr. Collins: That is all I have. Do you want this in the record?

Mr. Brobst: I think we are entitled to the gross earnings.

Mr. Collins: I will give you both.

Gross earnings for August, \$400.14. Net take-home pay was \$344.64.

(Testimony of William Kent Carson)

September, gross earnings \$325.34; net take-home pay \$283.34.

October, gross earnings \$242.05; take-home pay \$214.65.

November, gross \$321.83; take-home pay \$282.23.

December, gross \$247.26; net take-home \$220.66.

January—I assume this is when he was sick?

Mr. Brobst: Yes.

Mr. Collins—\$98.42 gross, and his take-home pay was \$93.82.

His earnings for one-half of September—that is preceding August—was \$87.10 pay in lieu of vacation.

He was off duty on February 3rd, the day of the injury, and up to that time for three days his gross earnings were \$22.21. I don't know what the take-home pay would be on that.

By Mr. Brobst:

Q. Is that approximately correct, Mr. Carson? [25]

A. Yes, sir.

Mr. Brobst: Incidentally, Mr. Collins, so that it might be clear, what is taken out of the man's earnings that reduces it from his gross to his net?

Mr. Collins: You have your Federal income tax.

Mr. Brobst: Hospital Association?

Mr. Collins: Hospital Association of \$2.75. That is what it used to be.

The Witness: It is \$3.25 now.

Mr. Collins: That is all that I know of.

Mr. Brobst: Then there is social security.

Mr. Allport: They deduct only the Federal income tax and it does not include hospitalization.

(Testimony of William Kent Carson)

Mr. Collins: I am glad you told me. I didn't know that.

Mr. Brobst: You may cross examine.

Cross Examination.

By Mr. Collins:

Q. Was the Southern Pacific Company the first railroad you were ever employed by? A. No.

Q. What other railroads did you work for?

A. I worked for the New York, New Haven & Hartford Railroad, and the Reading Railroad at Fort Benning, New Jersey.

Q. In the capacity as brakeman or yardman?

A. As yardman on the Reading. [26]

Q. That gives you an experience as a railroad man over what period of time? How long have you been with the railroad? A. About four years.

Q. When you were employed by the Reading and the other railroads which you have mentioned, you were furnished with brake clubs, were you not? A. No, sir.

Q. None of them furnished you with a brake club?

A. No, sir.

Q. Where did you get the brake club that you used?

A. We didn't have any brake clubs there.

Q. Is that because they were operating on level track?

A. Yes, sir.

Q. Then when you came to work for the Southern Pacific you were furnished with brake clubs?

A. Yes, sir.

Q. Every yardman is furnished with a brake club?

A. Yes, sir.

(Testimony of William Kent Carson)

Q. Do you know whether or not brakemen on the road trains, the main lines, are furnished with brake clubs?

A. Yes, sir.

Q. In other words, that is the equipment which is furnished every yardman and every brakeman when he gets to work in that capacity? [27]

A. Yes, sir.

Q. Now on the morning when you picked up this club—withdraw that.

These brake clubs then are handed out from time to time as the yardmen ask for them, is that correct?

A. Well, yes, sir.

Q. In other words, when you go to work there is a big tub or barrel or something in which there are a number of brake clubs? A. Yes, sir.

Q. And you select a brake club from the number that may be there, is that correct? A. Yes, sir.

Q. And in the event a brake club is in there which in your opinion has been used a sufficient length of time you have a right to take another one, do you not?

A. Yes, sir.

Q. And any brake club that appears to you to be defective, you can take it or you can reject it?

A. Yes, sir.

Q. And they will give you a new brake club?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. About what is the life of a brake club, do you know, [28] approximately? How long are they used?

A. I don't know.

(Testimony of William Kent Carson)

Q. You use them then as long as in your opinion the brake club is usable and good for the purpose for which it is supplied to you, is that correct? A. Yes, sir.

Q. These black marks that we see on the outside and the grooves, that is where you put it into the brake wheel and the dirt rubs on the brake club, is that correct?

A. Yes, sir.

Q. That in no way affects the usefulness of the club or its durability? A. No, sir.

Q. So on the morning when you selected this brake club you saw one which appeared to you to be practically new? A. Yes, sir.

Q. And you examined it to see whether or not it was usable, is that correct?

A. I looked at it to see if there was any splits in it.

Q. Did you or did you not examine it to see whether or not the brake club appeared to be safe to use?

A. Yes, sir.

Q. When you examined the club you found no flaws or defects which were visible, did you?

A. No, sir. [29]

Q. It looked like a practically brand-new brake club, in perfect condition, didn't it? A. Yes, sir.

Q. No examination so far as your eyes were concerned revealed to you, nor with the exception of the brake which appears now—speaking about this crack—that there was any defect whatsoever in the manufacture or construction of the club?

A. Not that I could see.

Q. Then you took the club and went to work and used it that morning, or was it in the evening?

A. It was morning.

(Testimony of William Kent Carson)

Q. How long did you see it before the accident happened? In other words, approximately how many hours?

A. We had been working pretty steady.

Q. About how many hours?

A. About two hours.

Q. You would say that you had tied down—when we say “tied down,” so that the jury will understand, we mean setting the brakes.

A. Yes, sir.

Q. There is only one brake on one end of the car?

A. Yes, sir.

Q. And that is called the B end of the car, is that correct? [30]

A. Yes, sir.

Q. And each time that you set the brake this club gave no indication whatsoever to you that it was going to break, did it?

A. No, sir.

Q. Now how many would you say you had tied down since you took this club in the morning, probably 15 or 20 cars?

A. I tied down more than that.

Q. About how many would you say in the time that you were working that morning—that is February 3rd, was it not?

A. February 2nd.

Q. That you tied down before this occurrence took place?

A. (Pause.)

Q. Just your estimate, please, Mr. Carson.

A. About 30 or 35 cars.

Q. You would say then, would you not, when you got this club that there were few marks on it, if at all, and these 30 or 35 cars you tied down did most of that marking on this club, isn't that correct?

A. Yes, sir.

Q. And during the time that you were tying down the 30 or 35 cars there was no indication, such as a

(Testimony of William Kent Carson)

springing in the club or a cracking of the club, to indicate that there was anything wrong? [31]

A. No cracking but it felt a little springy.

Q. What? A. It felt a little springy.

Q. There is a spring, of course, in every club as you use it? A. Yes, sir.

Q. In other words, it was just the normal club that you picked up from time to time and used in tying down cars other than the fact that it did break at the time that you fell? A. Yes, sir.

Q. Now I understand that you were riding a gondola.

A. No, a tank car.

Q. I beg your pardon, a tank car. On a tank car the brake of course is at the B end and between the brake staff and the end of the tank car there is a platform for you to stand on, is there not? A. Yes, sir.

Q. That is, as distinguished from the platform that you stand on at the end of a boxcar? A. Yes, sir.

Q. What distance was there between the brake staff and the brake itself, talking now about the top of the brake—what do you call that, the wheel?

A. The wheel.

Q. What do you call that, that wheel on top that you [33] take hold of? A. Just call it a wheel.

Q. I thought you had some pet name for it.

A. No.

Q. How much distance is there between the wheel on the top of the brake staff and the tank where you were standing to set the brake?

A. From the staff brake to the side of the tank?

Q. Yes, to the end of the tank.

A. About two feet.

(Testimony of William Kent Carson)

Q. You were standing between the brake and the tank, is that correct? A. Yes, sir.

Q. The tank is round? A. Yes, sir.

Q. And then it its customary practice, is it not, in this country to set up the brakes with this club so as to be sure that they don't get away and go down to the main line over the derail and cause an accident, is that correct? A. Yes, sir.

Q. And it was your duty to ride this cut to a standstill and set up the brakes, is that correct?

A. Yes, sir.

Q. Then when this cut of cars—was it two or three?

A. It was three cars. [33]

Q. That is, a boxcar and two tankers?

A. Yes, sir.

Q. When the engineer made the cut, or I should say stopped it and let these cars roll, would you say they were rolling some four or five miles an hour?

A. Yes, sir.

Q. This cut of three cars was then going to go to a joint, to some other cars on the same track which were spotted? A. Yes, sir.

Q. During the process of making up a train to go out on the road? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. How far would you say that the cars which were already in the train which you were making up were from the point where the pin puller cut the three cars loose? A. Oh, about seven cars.

Q. When we speak of seven cars we are speaking of 45-foot cars or 40-foot cars? To which do you refer?

(Testimony of William Kent Carson)

The jury doesn't understand what we mean when you and I speak of about seven car lengths.

Mr. Brobst: I think those cars average about 45 feet.

Mr. Collins: They run from 40 to 55 feet. [34]

By Mr. Collins:

Q. You are figuring on 40-foot cars? A. Yes.

Q. Then the cut was made when the car which was going to a joint on making up the train was somewhere around 210 feet or 200 feet? A. Yes, sir.

Q. And moving about five miles per hour?

A. Yes, sir.

Q. You started to set up the brakes, is that right?

A. I started to set up the brakes when I got clear of the track.

Q. When you got clear of what?

A. When it was clear of the main line.

Q. You mean after you cleared the switch point?

A. Yes, sir.

Q. And you were standing there and you used your hands to take up the slack, is that correct?

A. Yes, sir.

Q. Now so that the jury will understand what we mean by taking up the slack, down at the base of your staff there is a chain which fastens to a pin, is that correct? A. Yes, sir.

Q. And when you set up your brakes you take up the slack by winding up the loose chain? [35]

A. Yes, sir.

(Testimony of William Kent Carson)

Q. There is a certain amount of loose chain on every brake which has to be there for a normal brake, is that correct? A. Yes, sir.

Q. After you have taken up the slack, in other words, taken up all chain, and wrapped it around your staff then you use your club to set it up tightly, is that correct?

A. Yes, sir.

Q. That is a normal, everyday operation indulged in every day by you yardmen, is that correct?

A. Yes, sir.

Q. Then when you put your club into the wheel, the spokes in there, you stick this club in between the spokes, is that correct? A. Yes, sir.

Q. And you gave one pull, is that correct, or had you taken several pulls with the brake?

A. No, I took one pull.

Q. You took one pull? A. Yes.

Q. Did you find the slack pretty well set up at the time you started to pull it? A. Yes, sir.

Q. In other words, the brake slack on that car was [36] just about the normal range of slack that you should find in cars which are in good condition, isn't that right, because you only had to give it one pull?

A. Yes, sir.

Q. The ratchet on that brake was in good shape?

A. Yes, sir.

Q. The dog was in good shape? A. Yes, sir.

Q. There wasn't anything the matter with the brake at all? A. No, sir.

Q. It was a perfectly normal operating brake without any defects whatsoever, wasn't it? A. Yes, sir.

(Testimony of William Kent Carson)

Q. You say there were not any defects?

A. No.

Q. The sole complaint you have in connection with this accident is that a brake club which you yourself inspected before going to work, for some unknown reason broke, is that right? A. Yes, sir.

Q. Of course in setting up a brake you don't measure the exertion or the effort that you put into the pull on a brake club, you give it whatever you think is necessary for the purpose of stopping this car within the distance in which [37] you have so that you will make a normal, easy joint or coupling, as we sometimes call it?

A. Yes, sir.

Q. And whatever that, in your opinion, is necessary, whatever effort is necessary to exert, that is the effort that you use, is that right? A. Yes, sir.

Q. Now, then, when the brake club broke, I take it you were standing about this far from the tank car, this distance between myself and this stand (illustrating)?

A. I was standing a little further away.

Q. About like so (illustrating)?

A. Well, the way I was, I was hanging on with this hand and I was toward the end of the car.

Q. That is right, over this side, but I am talking about the distance between you and the tank car, your back, about how far would you say was the space between your back and the tank car?

A. It was a little over two feet.

Q. Isn't the distance between the brake staff and the car about two feet? A. No, sir.

Q. And you were between that? A. No, sir.

(Testimony of William Kent Carson)

Q. So whatever width your body is, you cut down the [38] two feet between the tank car and your back, isn't that correct?

A. Well, the brake club stands over here and I was over here at the end of the tank like that (illustrating).

Q. In any event, when the brake club broke you went back against the tank car, is that right?

A. Yes, sir.

Q. And you didn't strike the corner of the car, you struck the flat surface?

A. No, I struck the round side.

Q. Tank cars are always round, is that correct?

A. Yes, sir.

Q. You didn't strike any corner of the tank car, any sharp edge of it?

A. I struck the grab iron that was on there.

Q. Now, then, after this accident happened you went over to the hospital and had an examination, is that right?

A. Yes, sir.

Q. Did anybody, or did you at any time call attention to any mark or black and blue spot on any portion of your body?

A. No, sir.

Q. In other words, so far as your knowledge—you are the man who had the injury—is concerned, there wasn't an abrasion nor mark on your body, was there? [39]

A. No, sir.

Q. By the way, did you contemplate riding out at the rodeo last Sunday?

A. No, sir.

Q. You didn't have that in mind?

A. No, sir.

Q. Didn't anyone tell you not to ride out there?

A. No, sir.

(Testimony of William Kent Carson)

Q. You do some riding, don't you?

A. A little bit.

Q. Are you a bronc peeler? A. No, sir.

Q. Bronc buster? A. No, sir.

Q. I take it then at the present time that your complaint is and has been since this accident some pain over the left hip, is that correct? A. Yes, sir.

Q. That is the limit of your injuries?

A. Yes, sir.

Mr. Collins: That is all.

Does your Honor take recesses?

The Court: I take recesses, yes, when the proper time comes.

Mr. Collins: When is the proper time? [40]

The Court: When you are through with this witness.

Mr. Collins: I am through with him.

The Court: Any redirect?

Mr. Brobst: I was just looking at my notes to see.

The Court: We will take a recess and give you a chance to look at your notes.

I will state, ladies and gentlemen of the jury, that at all recesses and adjournments of court, remember this admonition of the Court so that I will not have to repeat it each time.

You are not to allow anyone to speak to you about this case, nor discuss it among yourselves, nor form or express an opinion until the case is finally submitted to you. Remember this admonition of the Court so I will not have to repeat it.

We will take a recess for 10 minutes.

(Short recess.)

The Court: Proceed.

(Testimony of William Kent Carson)

Redirect Examination

By Mr. Brobst:

Q. Mr. Carson, when you were up at the San Francisco Hospital, did they do anything to you up there to attempt to relieve the pain in your back?

Mr. Collins: Objected to on the ground it is calling for a conclusion of the witness. That is up to the experts to testify to. [41]

By Mr. Brobst:

Q. What did they do to you up there?

A. Before I left they pulled my tonsils out in Tucson, then they pulled my teeth out in San Francisco.

Mr. Collins: I can't hear the witness.

By Mr. Brobst:

Q. Before you left the doctor in Tucson did what?

A. Pulled my tonsils out.

Q. What was the purpose of that, if you know?

Mr. Collins: That is objected to as calling for a conclusion of the witness. It would be hearsay.

The Court: Sustained.

By Mr. Brobst:

Q. That was done by a Southern Pacific doctor?

A. Yes, sir.

Q. Did you request that they be taken out?

Mr. Collins: That is objected to as immaterial. The presumption is that a doctor doesn't perform an operation unless it is agreed to.

The Court: Overruled. The question is whether he did or did not.

The Witness: The doctor says that my —

Mr. Collins: Just a minute.

(Testimony of William Kent Carson)

The Court: He asked you, did you request the doctors to remove your tonsils. [42]

The Witness: No, sir.

By Mr. Probst:

Q. Then when you got up to San Francisco, what did the doctors up there do?

A. They pulled some teeth out.

Q. Did you request them to pull your teeth out?

A. No, sir.

Q. Did they give you any explanation as to why they wanted to pull your teeth out?

Mr. Collins: That is objected to on the ground it would be hearsay.

Mr. Brobst: I don't think so.

The Court: Overruled. A doctor is in a different situation than the ordinary witness on a man's treatment.

By Mr. Brobst:

Q. You may answer now.

A. The doctor says those teeth might be causing the pain in my back.

Q. Well, then, after you had your teeth pulled out and your tonsils removed, state whether or not you still have pain in your back.

A. I still have pain in my back.

Q. Did the removal of your teeth or tonsils improve your condition any? A. No, sir. [43]

Mr. Brobst: That is all. I have no further questions.

Recross Examination

By Mr. Collins:

Q. You had a previous injury to your back in 1946, didn't you? A. Yes, sir.

Mr. Collins: That is all.

(Testimony of William Kent Carson)

Redirect Examination

By Mr. Brobst:

Q. How long were you off work, if at all, as a result of that injury? A. Two days.

Q. Whereabouts was the injury to your back at that time? A. It was in the lower part of my back.

Q. Which side was it on?

A. It was both my left and right.

Q. How did you get that injury?

Mr. Collins: That is objected to as immaterial.

The Court: You went into it. You asked him if he had received a previous injury. Overruled.

The witness: I was backed up against a caboose.

By Mr. Brobst:

Q. You were backed up against a caboose?

A. Yes. [44]

Q. How long did that condition bother you?

A. That just bothered me about two days.

Q. How long did you work after that steadily up until this accident happened?

A. Right after that I got my thumb smashed.

Q. Were you off work as a result of your thumb being smashed? A. Yes, sir.

Q. But aside from that, did you work steadily right then up to the time this accident happened?

A. Yes, sir.

Q. How long was that? For what period of time?

A. I worked up to about December 27th, then I went to the hospital with a cold.

Q. I don't understand you. How many months did you work after you got hurt and were off for two days,

(Testimony of William Kent Carson)

how many months or years was it up until the time of this accident? A. It was a month.

Q. Then during the month of, I believe it was January or December, when your earnings were down, was it because of that?

A. I had been in the hospital and I had the flu.

Mr. Brobst: I think that is all.

Mr. Collins: That is all.

The Court: You are excused. [45]

(Witness excused.)

Mr. Brobst: Call Mr. Byrne.

DANIEL J. BYRNE, JR.

called as a witness by and in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: Daniel J. Byrne, Jr.

The Clerk: How do you spell your last name?

The Witness: B-y-r-n-e.

Direct Examination

By Mr. Brobst:

Q. Mr. Byrne, where do you live?

A. Tucson, Arizona.

Q. Do you know the plaintiff in this action, Mr. William Carson? A. Yes, sir.

Q. Were you at Tucson working at the time that he was injured? A. Yes, sir.

Q. What were your duties at that time?

A. I was switching.

Q. You were a switchman? A. Yes, sir.

(Testimony of Daniel J. Byrne, Jr.)

Q. Were you working in the same crew with him?

A. Yes, sir. [6]

A. About what time of the day or night did the accident happen?

A. Well, it was, I would say, around 10:30 in the morning.

Q. What time had you gone to work that morning?

A. 7:59.

Q. Did you yourself see Mr. Carson at the time that this club broke?

A. Well, I seen him on the cars up on track 11 and applying the brake. I didn't see the club break, but I seen him lunge back toward the tank.

Q. You saw him lunge towards the tank?

A. Yes, sir.

Q. Did you then go over to him? A. No, sir.

Q. When did you go over by him, or did he come to you?

A. No, the foreman, he went up, I think the foreman went up towards him and was speaking to him, and I stayed down on the lead with the cut of cars.

Q. How many cars were there in this cut that Mr. Carson was trying to set the brakes on?

A. There was three cars.

Q. What was the type of car that he was riding?

A. A tank car.

Q. Did you go over afterwards and look at the tank [47] car?

A. No, I didn't.

Q. Do you know what type of brake there is that is on the tank car? A. Staff brake.

(Testimony of Daniel J. Byrne, Jr.)

Q. That is a hand brake, is it not? A. Yes, sir.

Q. Have you operated these staff brakes on tank cars?

A. Yes, sir.

Q. And had you operated that staff brake on those oil cars prior to the time that Mr. Carson was injured?

A. Yes, sir.

Q. Now the track that these cars are on, was that on a grade or was it level?

A. It was on a grade.

Q. Did the grade go in the direction in which the cars were moving or did it go upgrade into the track?

A. It went upgrade to go into the track.

Q. About how fast were the cars moving at the time that you saw Mr. Carson lunge toward the tank?

A. I wouldn't say. I couldn't say on that.

Q. You were too far away to judge that?

A. Yes.

Q. Now all these brakes are hand brakes?

A. Yes, sir. [48]

Q. Do you use any other kind of equipment? Do you have to use any other kind of equipment to set them?

A. Yes, a club.

Q. Where did you get those clubs?

Mr. Collins: Is there any dispute about that, counsel?

By Mr. Brobst:

Q. Where did you get the clubs?

A. We generally pick them up at a place where they have them for us.

Q. Just speak up.

A. They generally have them in a can or on an engine where we can pick them up.

(Testimony of Daniel J. Byrne, Jr.)

Q. Who puts them in the can there?

A. The supply man generally fills up the can.

Q. And he is the supply man for the Southern Pacific Company? A. Yes, sir.

Q. Is this the type of club that is supplied to you?

A. (Examining club) Yes, sir.

Q. Did Mr. Carson work any more that day after you saw him lunge against the tank car, that you observed? A. I don't think he did.

Q. Now, Mr. Byrne, is it possible to set those brakes by a single use of the hands without the aid of a club?

A. No, sir. [49]

Q. You have to use the club to set that type of brake?

A. Yes, sir.

Mr. Brobst: I have no further questions.

Mr. Collins: That is all.

The Court: It isn't clear to me how you use this club. What does it do? How do you use it?

The Witness: You could either apply pressure by pulling on it or you can shove on this brake.

The Court: Where do you put it?

The Witness: In the spokes of the wheel on top of the brake. There is a staff and a spoke wheel on top and we generally stick the club in there and wind it up. It tightens it up.

Cross Examination

By Mr. Collins:

Q. It is used for leverage? A. That is right.

Q. By sticking it down through the spoke and pulling in on or pushing on it, whichever you want to?

A. That is right.

Mr. Collins: That is all.

(Testimony of Daniel J. Byrne, Jr.)

Redirect Examination

By Mr. Brobst:

Q. Maybe we can describe it a little better. There is a staff like this (illustrating) on the car, like I have this [50] pencil, is that correct? A. Yes, sir.

Q. Then on top of the staff there is a wheel?

A. That is right.

Q. And the wheel has spokes in it? A. Yes, sir.

Q. When you wind on the wheel on top of the shaft that brings up a chain that tightens up the brake shoes on the car? A. That is correct.

Q. And to get leverage you insert the club in the spokes of the wheel and then you can pull around that way and get more leverage, is that correct?

A. That is right.

Q. Or you shove on it, whichever way you do, is that correct? A. That is right.

Q. And that is what is known as the Ajax hand brake.

A. Well, it is known as a staff hand brake.

Mr. Collins: The Ajax power brake.

The Court: Any further questions?

Mr. Collins: No questions.

Mr. Brobst: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Brobst: Mr. Barnett. [51]

VALNEY BARNETT

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Valney Barnett.

The Clerk: How do you spell that?

The Witness: V-a-l-n-e-y; B-a-r-n-e-t-t.

Direct Examination

By Mr. Brobst:

Q. Where do you live, please?

A. Tucson, Arizona.

Q. What is your business or occupation?

A. Switchman for the S. P. Railroad.

Q. How long have you been switching for them?

A. Five and a half years.

Q. Were you out there as part of the crew with Mr. Carson at the time that he was injured?

A. Yes, sir.

Q. What were your duties at that time?

A. I was foreman.

Q. Did you actually see Mr. Carson at the time that the club broke? A. Yes, sir.

Q. Would you just describe what you saw, please?

A. Well, I saw him setting a brake on a certain car [52] and he fell against the end of the car. At the time I didn't know just exactly what had happened until I could get to him.

Q. Did you go over to him? A. I did.

Q. Did you see the club that he was using when you got over there?

A. Well, I saw a club; yes, sir.

(Testimony of Valney Barnett)

Q. Would you recognize this as being the club?

A. (Examining club) Well, it could be.

Q. Now Mr. Carson has identified it as the club, but it is just exactly like those that they use?

A. That is true.

Q. Now what did you do with the club after you had gotten it?

A. Well, I didn't do anything with it myself.

Q. Who did you turn it over to?

A. Mr. Carson.

Q. About how fast was the cut of cars moving that Mr. Carson was on at the time that he lunged against the end of it?

A. Well, they were practically to a stop.

Q. Now what type of brake was on this — you went over to the oil car, did you, or the tank car?

A. That is true.

Q. What type of brake did it have on it? [53]

A. Staff brake.

Q. Is that a hand operated brake?

A. Well, they are commonly called hand brakes.

Q. Can you set them properly by hand?

A. Not in the Tucson yard.

Q. What are you required to use to set them?

A. A club.

Q. Is that part of the braking equipment?

Mr. Collins: Just a minute.

The Witness: It is.

Mr. Collins: That is objected to as calling for a conclusion of the witness, as to whether it is part of the braking equipment. It may be that they use it for the purpose of operating the braking equipment, but this witness couldn't testify as to whether or not they were

(Testimony of Valney Barnett)

part of the braking equipment of the car itself. Obviously it isn't because it is not attached to the car.

The Court: You may reframe the question. I will sustain the objection for the present. I am not denying you the right to show that it was equipment that was used there.

By Mr. Brobst:

Q. Can the brake be used efficiently without the use of a brake club?

A. Well, not in the Tucson yard, they cannot.

Q. In other words, the brake will not operate efficiently unless a brake club is used, is that correct? [54]

A. Yes.

Mr. Brobst: I have no further questions.

Mr. Collins: Neither do I.

The Court: You are excused.

(Witness excused.)

The Court: You say you want a little time, counsel. Do you want the Court to recess until 2:00 o'clock? Will that give you enough time?

Mr. Brobst: Yes, your Honor.

The Court: We will recess until 2:00 o'clock. Remember the admonition.

(Whereupon, at 11:50 o'clock a. m., a recess was taken until 2:00 o'clock p. m. of the same date.) [55]

Los Angeles, California; August 27, 1947; 2:00 o'clock
p. m.

Mr. Brobst: Your Honor, I have a witness here and I would like to look at the brake club, if he could step out in the witness room and look at it.

Mr. Collins: Do you want to put him on next?

Mr. Brobst: As soon as he looks at it. May we have a moment?

The Court: Certainly.

(Conference between counsel and witness.)

Mr. Brobst: I will put this gentleman on right away.

WILSON D. JACOBS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Wilson D. Jacobs.

(Conference between counsel.)

Mr. Collins: Your Honor please, we have agreed that the medical witnesses need not be excluded, if you have no objection.

The Court: Very well, if you have agreed to that.

Mr. Collins: If it is agreeable to your Honor.

The Court: Whatever you have agreed upon is agreeable to me. [56]

Direct Examination

By Mr. Brobst:

Q. What is your business or occupation, please?

A. I am a yardman with the Southern Pacific, this time since October 1921, but I have been working as local chairman for the Brotherhood of Railroad Trainman since 1936.

(Testimony of Wilson D. Jacobs)

Q. How many years all told of railroad experience have you had?

A. My first railroad service was in 1900.

Q. And as a yardman?

A. 1903, with the exception of about four years when I was a brakeman and conductor, 1908 to 1912.

Q. In the course of your work as a railroad man, have you handled brake clubs?

A. Yes, sir, for a great many years.

Q. Have you used brake clubs?

A. Oh, yes. I have rolled cars in the Los Angeles yard for the Southern Pacific for approximately 10 years out of my service here.

Q. During all of that time have you had occasion to use brake clubs?

A. Most of the time; yes, sir.

Q. Now I will show you this brake club —

Mr. Collins: May I ask a question, counsel?

Mr. Brobst: Yes, sir. [57]

Mr. Collins: Your last service as a yardman was when?

The Witness: My last service working in the yard was November 1939, as I remember it.

Mr. Collins: Almost eight years ago?

The Witness: Yes, but I have been representing the yardmen on the Los Angeles Division since 1936, and I go into the yard daily.

By Mr. Brobst:

Q. Now, Mr. Jacobs, do you recognize this as being a type of brake club that is used by the Southern Pacific?

A. Yes, sir.

Q. Would you just state, is that brake club that you have there a normal brake club?

(Testimony of Wilson D. Jacobs)

Mr. Collins: That is objected to on the ground there is no foundation laid as to what is a normal brake club, whether he knows what the specifications are for a normal brake club.

The Court: Sustained.

By Mr. Brobst:

Q. Is that the type of brake club that was in use while you were working for the Southern Pacific Company?

A. Yes, sir. This type of club has been used on the Los Angeles Division of the Southern Pacific for a good many years. I couldn't say exactly how long, but approximately 15 or 18 years. Before that they had a little different type than this. [58]

Q. And you are thoroughly familiar with that type of club?

A. Yes, sir. I have rode many a cab with this type of a club.

Q. And the clubs that you used were supplied to you by the Southern Pacific Company?

A. That is right.

Q. I will ask you now, in your opinion is that a good strong club sufficient to be used in breaking cars?

A. No, sir.

Q. Why not?

A. Well, the club is of an inferior grade of hickory. These clubs are made of, or are supposed to be made of —

Mr. Collins: Just a moment. We move that the answer be stricken out so that I may cross examine on voir dire.

Mr. Brobst: I will ask him why he says that.

Q. Why do you state that?

(Testimony of Wilson D. Jacobs)

Mr. Collins: Just a minute. I still think I am entitled to go into his qualifications.

The Court: Yes, I think so.

Mr. Collins: May the answer be stricken for the purpose of examining on voir dire?

The Court: Yes, it may be stricken for the present. Go ahead. [59]

Voir Dire Examination

By Mr. Collins:

Q. What experience have you had in the manufacture of brake clubs? A. I never had any.

Q. What experience have you had in the tensile strength of wood?

A. I have represented —

Q. No, I didn't ask you who you represented, I asked you a simple question.

The Court: Let him complete his answer.

The Witness: I have represented a great many yardmen that have been involved in accidents on account of cars not being controlled that were under their charge and the specifications of brake clubs have been explained a great many times by the officers of the Southern Pacific Company that purchase them and supply them to the yardmen. That is what gives me the information that I have, on account of the information that I have heard the officers state at investigations.

Q. When you say "officers" you mean trainmasters and roadmasters?

A. And men in the car department and also in the store department.

(Testimony of Wilson D. Jacobs)

Q. So far as you are concerned personally, you have conducted no tests, is that right? [60]

A. Only in applying brakes.

Q. I am speaking now about testing woods.

A. I have assisted in testing brakes where there was an argument as to it.

Q. Would you please answer my question?

The Court: Let him complete his answer. You cut him off too quickly. Go ahead.

The Witness: Let me have the question.

(The question referred to was read by the reporter as follows:

“Q. So far as you are concerned personally, you have conducted no tests, is that right?

“A. Only in applying brakes.

“Q. I am speaking now about testing woods.”)

The Witness: Well, I have assisted in making tests on brakes with brake clubs where brake clubs were used and where there had been an accident in connection with investigation that was being conducted.

Mr. Collins: I move that the answer be stricken as not responsive. I asked him what experience he had had in testing the tensile quality of woods.

Mr. Brobst: I will oppose the objection, your Honor.

The Court: He confines his questions to woods. That is what he is objecting to. This witness hasn't testified as to what kind of woods he has had experience with. [61]

Mr. Brobst: This witness refers to his testing of brake clubs when they have broken and accidents have arisen. I think that is proper.

The Court: Overruled. Go ahead.

(Testimony of Wilson D. Jacobs)

By Mr. Collins:

Q. Do you know what the tensile strength of oak is?

A. No, I don't.

Q. Do you know whether or not in the selection of wood for a brake club what examination or what is to be taken into consideration with reference as to how fast it grew or how slow it grew?

A. All I know is what I have heard the officers say.

Q. I am speaking now, Mr. Witness, from your own experience.

A. I never raised any timber.

Q. You don't know anything about how many rings are required or whether any are required or what the growth is?

A. Yes. The growth is supposed to be second growth hickory.

Q. I am speaking about whether it should be fast or slow.

A. I don't know whether they grow it fast or slow.

Q. Do you know second growth hickory when you see it?

A. I am told these brake clubs are supposed to be second growth hickory. [62]

Q. I asked you, can you pick up a piece of wood and tell whether it is first or second growth?

A. I am not a wood specialist, only brake clubs.

Mr. Collins: I object on the ground it is calling for a conclusion of the witness, no proper foundation laid whether there is proper wood in that club or not.

The Court: Overruled.

(Testimony of Wilson D. Jacobs)

Direct Examination (Continued)

By Mr. Brobst:

Q. Now, by picking that club up, can you tell whether or not it is strong enough to use in the ordinary braking operations?

Mr. Collins: That is objected to on the ground it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

The Court: Overruled.

The Witness: Well, this club is too light to be of a good grade of wood that will sustain the strain that is put on a brake club when it is applied with any degree of force.

By Mr. Brobst:

Q. Is that something that any experienced supply man can determine by picking it up and inspecting it?

Mr. Collins: That is objected to as calling for a conclusion of the witness.

The Court: Sustained. [63]

By Mr. Brobst:

Q. The only time you ever saw that club was when you walked into the courtroom here just a minute or so before court started?

A. That is right; yes, sir.

Mr. Brobst: I have no further questions.

Cross Examination.

By Mr. Collins:

Q. What is the weight of that club?

A. Well, I couldn't say. I could only estimate. It would be only two and a half pounds, something like that.

(Testimony of Wilson D. Jacobs)

Q. What is the weight of a club that you have in mind?

A. Well, it would be approximately half a pound or so heavier than that.

Q. What is the specified weight, do you know?

A. No, I don't.

Q. You don't know whether it is 18 pounds, 19 pounds or 36 pounds?

A. No, I don't. I don't think there is any specified weight, according to the specifications. If they have any, I have never seen it.

Q. In other words, you are just picking up a club and feeling it in your hand and saying it doesn't feel heavy enough to me?

A. I say because I have seen brakes like that being [64] broken before and breaking them myself before.

Q. You just simply picked it up and after holding it in your hand you say you don't think it is quite heavy enough?

A. That is right. I don't think it is heavy enough.

Q. And you say that you also base your opinion on the fact that you have seen other clubs that are broken?

A. Many of them; yes, sir.

Q. And you have seen all sizes broken?

A. I have.

Q. Lightweight, heavyweight, middleweight? Isn't that true?

A. Yes.

Mr. Brobst: Let the witness answer. You cut him off all the time.

The Witness: I would like to have the question re-read.

(Testimony of Wilson D. Jacobs)

(The record referred to was read by the reporter as follows:

("Q. And you have seen all sizes broken?

("A. I have.

("Q. Lightweight, heavyweight, middleweight? Isn't that true?")

The Witness: I have seen all kinds of clubs broken, and some of them are broken on account of being worn, some of them are broken on account of being inferior quality wood that were not worn, and those that were worn that break, if they are a good club and have been used any length of time the brake will be stringy. The break runs through, it will be splintered out, while this is broken in two.

By Mr. Collins:

Q. You don't see any defects in the club, do you?

A. Only the weight.

Q. I asked you about the visible defects.

A. There is no visible defects, but if I would pick that club up, if I was going to ride a car, I would use it with a great deal of care.

Q. Just one more question: You said that the weight in the club indicated to you that quality of the wood, didn't you?

A. It indicates to me the strength of the wood.

Q. Just wherein does the weight indicate quality?

A. Well, I am not a wood specialist and I can't answer it except only in this way, that I know from my

(Testimony of Wilson D. Jacobs)

experience if I get a good heavy club I never have any trouble with it breaking, but a light club that is the same size in dimensions as the heavy club is and it breaks, why that is the only thing that I can say.

Q. You say you represent the yardmen?

A. Yes, sir.

Q. Such as this man? He is a yardman, is that correct? I mean the plaintiff? [66]

A. I don't know him. I never saw him.

Q. He is a yardman, isn't he?

The Court: He said he didn't know.

By Mr. Collins:

Q. Do you know whether he is a yard man?

A. No, I don't.

Q. Well, assuming that he is then you represent yardmen similarly employed, do you not?

A. I represent yardmen on the Los Angeles Division of the S. P.

Mr. Collins: No further questions.

Mr. Brobst: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Brobst: I see Dr. McReynolds is here. Do you have any objection to my putting him on out of order?

Mr. Collins: I thought he was the last witness you had.

Mr. Brobst: No, I have one more.

Mr. Collins: No objection.

CHESTER CORNELL McREYNOLDS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, Doctor?

The Witness: Chester Cornell McReynolds.

The Clerk: How do you spell McReynolds? [67]

The Witness: M-c-R-e-y-n-o-l-d-s.

Direct Examination.

By Mr. Brobst:

Q. Doctor, did you have occasion to examine the plaintiff in this case, Mr. Carson? A. Yes, I did.

Q. When did you make that examination, please?

A. The 22nd of August, this year.

Q. Where was the examination made?

A. In my office in Los Angeles.

Q. Doctor, before we get to the examination, what medical school did you graduate from?

A. I graduated from the College of Medical Evangelists here in this city.

Q. What was the date of your graduation?

A. 1936.

Q. Have you specialized in any particular branch of medicine? A. Orthopedic surgery.

Q. Are you a member of any of the staffs of any of the local hospitals? A. Yes.

Q. Which ones, please?

A. Methodist Hospital, White Memorial Hospital, Los Angeles County Hospital, Mission Hospital and on the courtesy [68] staff at the St. Francis Hospital.

(Testimony of Chester Cornell McReynolds)

Q. Doctor, when Mr. Carson came to you first what did you do by way of examining him?

A. I asked him how he got hurt—he was last examined in our office four months before—then I examined his back in the usual manner that I examine backs.

Q. When you examined his back, what did you find, please?

A. Well, the patient was able to stand erect in normal position and did not have any list to either side as compared with the previous examination, at which time he did have.

He did not have muscle spasm in the lower part of his back, which he had had at the previous examination.

He still complained of tenderness in the lower part of his back on percussion with my fist when he was flexed forward, tenderness in the midline of his back, the lumbus axial junction, and pain on hyper-extending his back.

Q. There was pain there that could be elicited when given these tests, is that correct?

A. That is correct.

Q. To the lower back? A. Yes.

Q. Now what other examinations did you make that would be helpful that you could tell us about?

A. He had pretty forward flexion of his back as far [69] as his flexion range was concerned, which was improved as compared with his previous examination. He could now reach to five inches of the floor, whereas formerly I think it was 18 inches.

He still had limitation of lateral flexion towards the left side. That was present consistently on repeated attempts without calling his attention to it.

(Testimony of Chester Cornell McReynolds)

The special straight leg raising tests were essentially negative. He had no limitation of straight leg raising.

His reflexes and sensory examination was essentially normal. No change.

The size of his left calf was still one centimeter smaller than the right, similar to the last examination. Size of his thighs were equal.

The hip flexion tests with the thigh thrown across the patient's abdomen, the so-called reverse Faber test, were identical, a little bit on the left side.

The torsion of the lower back, that is, twisting his back with his right hip forward and shoulder backward, elicited some pain, but torsion of the opposite direction did not elicit any at all.

There was no muscle spasm when it was reversed, but there was some guarding of muscle spasm when put forward.

Q. Doctor, did you take any X-ray pictures to determine what the difficulty was? [70]

A. Yes, we took X-rays of this region of his spine as a comparison of those that we had taken previously.

Q. And would a showing of those X-rays to the jury be helpful to explain the condition?

A. Well, the X-rays are not especially remarkable, the lesions present is not very easily seen at a distance.

Mr. Brobst: I wonder, your Honor, if we have a light box for the display of X-rays.

The Court: The bailiff will see.

The Witness: The X-rays made last April showed nothing of note except a thinning of the lumbosacral disk, that is, the portion between the lower lumbar and the top of the patient's sacrum.

(Testimony of Chester Cornell McReynolds)

By Mr. Brobst:

Q. What would that indicate?

A. That this disk had undergone degeneration changes of long standing, probably present for several months or years.

On reexamination in April there is no essential difference between the two films. There has been no advancement of the lesion or further thinning of the disk.

Q. Doctor, what do you diagnose the plaintiff's condition to be, his present condition? What is causing his trouble?

A. Well, a descriptive diagnosis would be chronic [71] strain of the lumbosacral joint or lumbosacral ligaments, with protrusion of his lumbosacral disk toward the left side. There is some evidence of nerve root irritation, with reference to pain to his left buttock and substantive complaint of numbness, tingling, remittent or recurrent in his left leg below the knee, the outer side of the leg.

Q. What kind of a prognosis can you give?

A. In view of the long-time-continued symptoms since the patient's injury, the patient probably will have the disability in his back if he continues to attempt to do work which requires forward flexion and lifting, reaching, probably have pain and disability in his back certainly for three or four months more or perhaps permanently. It is not possible to know. He has a defective joint in that region and persistent irritation of the joint in forward flexion position, working in that position, frequently becomes a chronic painful condition.

Q. Is there any treatment suggested?

A. The patient has had all of the conservative type of treatment, that is, physiotherapy and restricted activity,

(Testimony of Chester Cornell McReynolds)

rest, up until one month ago when he attempted to go back to work. We think that after a patient has not responded to that type of treatment he ought to have some type of external support, such as a well-fitting, low back brace to hold his back and to continue his work with the brace on. [72]

Q. Well, now, in the event, Doctor, that the external brace does not relieve his difficulty, what next procedure would be followed?

A. If he is still disabled from doing the type of work that he is in and cannot or does not change his occupation, we recommend that he have an operative fusion of this particular defective joint in order to get away from the symptoms.

Q. Well, now, as far as the defective joint is concerned, you say that is something of long standing?

A. That is right.

Q. And what would happen to a joint like that if force were applied to it?

A. It is sprained, just the same as any other joint that is forced beyond its painless range of motion.

Q. Let me ask you this: Is it possible to go along with a back in that condition and not know of it and then meet with a sudden force and cause it to begin to pain and create trouble?

A. That is most often the history that patients give us for this kind of trouble; yes.

Q. What is your opinion in that regard with relation to this particular man's injury?

A. Well, he has a joint that is more susceptible to injury than a normal joint would be, and once it is injured, the type of tissue that is present, is not capable

(Testimony of Chester Cornell McReynolds)

of recover- [73] ing normal, flexible function as fast as normal tissue is. For that reason his injury is not recovered as fast as you would expect in a normal back.

Q. And as far as the prognosis is concerned, you can't give a definite one until the external support test has been applied, is that correct?

A. In terms of time of disability, no, you cannot.

Q. Something that only time will tell as far as giving a definite prognosis is concerned?

A. That is right.

Mr. Brobst: I think that is all. You may cross examine.

Cross Examination

By Mr. Collins:

Q. You say "this joint"; which vertebra is that?

A. The joint between the lower lumbar vertebra and the top of the sacrum.

Q. The fifth lumbar and the sacrum?

A. That is right.

Q. You say that is of long standing?

A. Yes, sir.

Q. You think there might have been some irritation or some aggravation by reason of this accident that he had?

A. That is what we assume from the history the patient gave us.

Q. You depend to a large extent upon the history that [74] the patient gives you?

A. We have no other source of information.

(Testimony of Chester Cornell McReynolds)

Q. That is true. I wonder if I could see those X-rays. I would like to see between the fifth lumbar and the sacrum, if I may.

When were the first X-rays taken?

A. The first X-rays were taken April 8th of this year.

Q. This is the fifth, right there (indicating)?

A. No, the fifth is right above that.

Q. Right here (indicating)?

A. This part (indicating).

Q. And the sacrum?

A. This is the sacrum.

Q. You say there appears to be a narrowing there?

A. As compared with these spaces above; yes.

Q. Isn't that normally true, that the space between the fifth and the sacrum is smaller?

A. It is often true in patients who are older than this man is.

Q. Isn't it true in normal people, even at ages 18, 24 and 25, that there is a variation and a smaller space between the fifth and the sacrum?

A. There is in the sense that the back part of the joint is usually narrower.

Q. That is right. [75]

A. The front part is usually wider. This other film demonstrates it a little better.

Q. There has been no damage or injury to any of the intervertebral disks?

A. The bone shadows are normal.

Q. Perfectly normal? A. That is right.

(Testimony of Chester Cornell McReynolds)

Q. You base your opinion wholly upon an opinion that there is some narrowing there?

A. It is less than half the width we would expect.

Q. It is not very marked, is it, Doctor?

A. Yes, it is quite marked.

Q. Let's see the other picture. (Indicating). It doesn't seem to be so marked in this picture.

A. No, the center of the X-ray tube was different so it passed between at this level and shows more accurately the condition present.

Q. In other words, had the center of the tube been properly placed it would not show as much narrowing in the picture that was taken in April as it does in this, is that correct?

A. I don't believe there is any essential difference as far as the meaning of the X-rays are concerned. No, it is the same in both films.

I would like to point out, however, that the narrowing [76] that is of significance as far as we are concerned is shown by a parallel pattern between the two bone surfaces. Now normally at this level, usually at this level, the front of the joint is wider apart. A degenerate change has permitted these two vertebrae to come together so that the two joint surfaces are parallel, and that is the thing that is of significance as far as we are concerned.

Q. Of course, Doctor, this degenerate change has been taking place for a long period of time?

A. Yes, that is correct.

(Testimony of Chester Cornell McReynolds)

Q. When you have damage to the intervertebral disk or where degenerated changes are taking place, every time the man walks or steps it affects that joint, does it not?

A. It affects all the joints in the spine.

Q. And particularly the one which has been damaged?

A. Yes.

Q. And that has been damaged some time either by trauma or from some other cause?

A. Very probably a gradual process; usually.

Q. In other words, we have a man here in which there is a gradual degeneration of the intervertebral disk between the fifth lumbar and the sacrum?

A. That is correct.

Q. Is that right? A. Yes. [77]

Q. And the pictures taken in April show a condition which is worse than the pictures taken here just about a month ago?

A. No, they show essentially the same condition.

Q. In other words, there has been no change from his condition, from the degenerate changes that have been continuing over a period of years, in April than there was a month or so ago when you took more pictures?

A. That is correct.

Q. In other words, it is stationary, is that right?

A. As far as the X-rays are concerned; yes.

Q. And doctors are compelled to fall back upon both substantive and objective symptoms?

A. They always are.

Q. That is correct, is it not? A. That is right.

Q. I think on your last examination the only objective symptom that you said that you found was some muscle spasm? A. And limitation of motion.

(Testimony of Chester Cornell McReynolds)

Q. Limitation of motion means how far the patient can bend or move either laterally or posteriorly?

A. As compared with the opposite direction; yes.

Q. But so far as the muscles were concerned, you found some muscle spasm?

A. Yes, with certain motions there was. [78]

Q. Explain to the jury what you mean by muscle spasm.

A. When muscles are relaxed, that is, when a patient is not using a muscle in order to maintain, in this case, his back in some particular position, the muscle is soft to touch. You put your hands on it and you can feel it, and as soon as he moves you can feel that tightness under the fingers.

Q. It is the same as flexing my arm, you can feel the muscle get tight, isn't that true? A. Yes.

Q. In other words, it may or may not be voluntary spasm of the muscle or it may be involuntary?

A. Well, it is possible to know whether it is voluntary or involuntary.

Q. I know it is possible.

Now at the commencement of the cervical spine you found that in very good shape?

A. I didn't examine his cervical spine.

Q. Did you make any examination of the dorsal spine?

A. Yes.

Q. What did you find there?

A. It was apparently normal in all of its functions.

(Testimony of Chester Cornell McReynolds)

Q. Did you find any indication of degeneration of any of the intervertebral disks, of the segments of the dorsal spine?

A. No objective evidence of it; no complaint about it. [79]

Q. Then you did find some complaint about pain in the lumbar spine?

A. In the lower end of it; yes.

Q. And you attributed that, I think, to a sacro-iliac sprain, isn't that what you referred to it as?

A. Yes.

Q. And didn't you say a bit ago that he could lean forward within five inches of the floor?

A. That is right.

Q. Normally?

A. I said he could lean forward to within five inches of the floor at the time I examined him.

Q. And that is approximately normal range of motion, is it not?

A. It is very good, yes.

Q. Better than you can do?

A. Well, I can do a little better than that.

Q. Now the next test that you gave him was the straight leg raising test, is that correct?

A. That is right.

Q. And you said both on the right and left side they were normal, didn't you?

A. They were equal on the two sides.

Q. Were they normal too? In other words, he could —

Mr. Brobst: Let the doctor answer. [80]

(Testimony of Chester Cornell McReynolds)

By Mr. Collins:

Q. Were they normal?

A. The motion of range on the affected side equaled the motion of range on the other side. That is normal for the patient.

Q. Let's put it this way: In the extension of the leg, that means bringing it up in front, does it not?

A. Flexion of the leg.

Q. You found it within normal limits, did you not?

A. Yes.

Q. Isn't it true that when flexion is within normal limits, and also his ability to bend forward, that it rules out a sacro-iliac sprain or a sacro-iliac subluxation?

A. I am not talking about a sacro-iliac subluxation.

Q. I am talking about it. Doesn't rule out damage to the sacro-iliac?

A. No, counselor. We are talking about the lumbar sacral joint, which is a different joint entirely.

Q. Doesn't it also rule that out?

A. Not entirely.

Q. You didn't find any muscle spasm, did you?

A. Yes.

Q. Where?

A. In the lumbar sacral region on the left side.

Q. To what extent? [81]

A. Sufficient to limit motion and torsion of his back.

Q. In other words, when he moved his back he complained to you, isn't that true?

A. No, I could move his back passively in the opposite direction without pain to him. I moved it forward, with a forward rotation of his hip to the right side and involuntarily he could not allow me to move it.

(Testimony of Chester Cornell McReynolds)

Q. In other words, there was resistance there?

A. Yes, that is right.

Q. Now did you find whether or not there was any muscle atrophy?

A. There is no gross muscle atrophy.

Q. In other words, when muscles atrophy it means there is lack of use, isn't that true?

A. That is right.

Q. And when there is no muscle atrophy it indicates the man is using his muscles daily?

A. Very possibly.

Q. You know, Doctor, if he didn't use his muscles they get soft and flabby, don't they?

A. That is right.

Q. And when you examined the back, did you find any atrophy of the muscles of the back?

A. No, sir, no atrophy.

Q. In other words, you found a man whose back muscles [82] showed no atrophy at all?

A. That is correct. The only atrophy he had was in his left calf.

Q. Now, Doctor, you said it was one centimeter. didn't you?

A. Yes.

Q. Isn't it true that you can take any juror in this jury box who is right-handed and measure his leg and you will find a difference of from one to three centimeters and yet they are perfectly normal?

A. No, sir, the normal variation is much less than that.

Q. How much is a centimeter?

A. There are two and a half centimeters to the inch.

(Testimony of Chester Cornell McReynolds)

Q. So you have about a quarter of an inch here?

A. A little more; about three-eighths of an inch.

Q. Isn't it true that nearly everyone has that variation, that this variation on this man is perfectly within normal limits?

A. No, I think not.

Q. How many people have you examined and found a variation of that amount or more in which there had never been any injury at all?

A. A very few of them that had that much difference in the calf of the leg that do not either have a history of some injury to the leg or a long-time history of pain in the leg. [83]

Q. Is that true in the arms also?

A. It is less true of the arms than it is of the legs.

Q. You say all the reflexes were normal?

A. That is right.

Q. The Babinski was normal?

A. That is right.

Q. The Achilles was normal? A. Yes.

Q. The Romberg was normal? A. Yes.

Q. Everything was normal about this time except that he complains of pain and the muscle condition which you said appeared upon movement?

A. And limitation of movement.

Q. That is correct. Everything else is normal?

A. Yes.

Q. Of course you can't see pain, can you? In other words, Doctor, outside of a small amount of muscle spasm you found nothing wrong with this man objectively at all, did you?

A. Well, counselor, we have gone over that point several times. I have always said there was limitation

(Testimony of Chester Cornell McReynolds)

of motion, which is not associated especially with muscle spasm.

Q. When we are talking about limitation of motion, you take my arm and move it?

A. That is right. [84]

Q. If it moves freely there is no limitation of motion. That is correct, isn't it?

A. If you move it as far as the other arm and the other arm is normal we will say that it is free.

Q. When you take hold of it to move it laterally or up and down and I resist you, then there is limitation of motion, isn't there?

A. That is voluntary limitation.

Q. There is limitation of motion though?

A. Yes.

Q. Now do you have any idea how many years this man has had this degenerative condition taking place between the fifth lumbar and the sacral joint?

A. That would be nothing but a guess, but certainly it has been longer than the time since his injury, which is only about six or seven months ago.

Q. In fact, it has probably been many years, is that right?

A. I have no other way to say it except that it probably has been, yes, more than two or three years.

Q. With that condition existing between the fifth lumbar and the sacral segment, jumping off and on cars, wielding brake clubs, wouldn't you expect him to have some pain?

A. Not until he has some forced or unguarded motion [85] that forces this defective joint beyond its free range of movement.

(Testimony of Chester Cornell McReynolds)

Let me explain further. The lower end of the back is a series of movable joints, and one joint will move as far as it goes, the other joints will move as far as they go, and when all joints have moved as far as they go then any force beyond that point will put an unusual strain on the weakest point, or on the most irritable link.

Q. Would you say that that force would be a movement forward or backward?

A. It may be in any direction.

Q. Now, Doctor, did he tell you about being hurt before on this railroad, of having his back injured in approximately the same place?

A. No, he gave neither Dr. Taylor nor I such a history of an injury.

Q. On December 2, 1946, in which he was off several days?

Mr. Brobst: Two days.

Mr. Collins: I said several. Doesn't that mean two in your language?

Mr. Brobst: No. A couple means two; several means more.

By Mr. Collins:

Q. You would expect, would you not, that there would be some complaint of pain, wouldn't you? [86]

A. Yes, if he were laid off two days because of pain in his back and he told me, I would have agreed with him.

Q. You would expect that this would have had something to do with his condition?

A. If it happened in the same place, I would say yes.

Q. He said it was approximately the same thing this morning, and you haven't any idea at the present time,

(Testimony of Chester Cornell McReynolds)

with this knowledge before you, whether that would have caused it or whether this would have caused it, have you?

A. If he went back to work the second day after his injury and worked until the present history of injury, I would say it probably contributed a little towards it.

Q. And perhaps this one contributed some more to it.

A. It doubtless did.

Mr. Collins: That is all, Doctor.

Mr. Brobst: That is all. Thank you very much.

The Court: You are excused.

(Witness excused.)

The Witness: Do you wish to keep these X-rays here?

Mr. Collins: I would like to keep them.

Mr. Brobst: Will you put Dr. Sutherland on out of order?

Mr. Collins: Certainly.

The Court: Is this witness called for the plaintiff or the defendant? [87]

Mr. Collins: For the defendant. We are putting him on out of turn.

The Court: Have you agreed?

Mr. Brobst: That is all right with me. I have consented.

ROSS SUTHERLAND

called as a witness by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, Doctor?

The Witness: Ross Sutherland.

The Clerk: How do you spell your last name?

The Witness: S-u-t-h-e-r-l-a-n-d.

Direct Examination

By Mr. Collins:

Q. Are you a doctor of medicine? A. Yes.

Q. And your educational qualifications are what?

A. Southern California in 1920, practicing industrial orthopedic surgery since 1924.

Q. Post graduate, if any?

A. Nine years of special orthopedic training with Ellis Jones.

Q. Dr. Ellis Jones? A. Yes.

Q. Are you on the staff of any of the various hospitals [88] here?

Mr. Brobst: I will stipulate to the doctor's qualifications if it will save time.

The Witness: Queen of Angels, California, Long Beach Community, Riverside and Palm Springs and Las Vegas.

By Mr. Collins:

Q. Did you examine Mr. Carson, Doctor?

A. Yes, on August 13th.

Q. Would X-rays taken in April 1946 and some later on be of any help to you?

A. Yes, they would, particularly in the lumbar sacral joint.

(Testimony of Ross Sutherland)

Q. There are some pictures that were taken. I think one set was taken in April and you can see when the other set was taken. It may be of some benefit to you.

A. (Examining X-rays) This patient is 25 years of age. He has a congenital failure of fusion of the lamina of the first sacral segment.

Q. Explain to the jury what you mean by that.

A. Well, where the process extends out in the vertebra they fail to fuse in the midline, and that is a minor defect giving a minor mechanically deficient back.

Q. You mean by that he was born that way?

A. Born that way, yes.

Actually there are changes in the angle of the lum- [89] bar sacral joint when you have these congenital anomalies.

In this particular case I heard Dr. McReynolds testify that he thought the joint was narrowed. I don't quite agree with that because I feel that where there is a pre-existent congenital anomaly I think this is somewhat of a normal joint for this type of mechanically inefficient low back.

He mentioned the fact that it wasn't quite wide enough forward. I think that is somewhat the angle of the tube, because I have a picture that shows very much widening of the front of the joint, and also the typical narrowing of the posterior part of the joint that he referred to. I don't see any particular erosion in it.

Q. What do you mean by "erosion"?

A. That is roughness of the superior border of the sacrum showing any traumatic change. In comparison with this picture I think it is definitely —

(Testimony of Ross Sutherland)

Q. Will you put the two of them side by side and demonstrate to the jury the congenital anomaly and why that is a normal back outside of the congenital anomaly in the lower lumbar sacral region?

A. The present existing congenital anomaly makes this joint a little variable, and I don't think there is any particular abnormality of the joint outside of the congenital anomaly. I think the man had a lumbosacral strain. When I examined him he seemed to have more of a sacro-iliac condition [90] than a lumbar sacrum. I felt that he was well on his way to recovery.

All these congenital anomalies, the low back, particularly in the lumbosacral joint, even when they are minor they are all predisposed to minor back weaknesses and they don't stand the strain of normal occupations as well as a normal back. So I didn't think he had any serious disability.

Q. Will you resume your seat, Doctor?

Now will you give the jury the result of your complete examination that you made of this man from the top to the bottom?

A. I examined him and we didn't find anything in the head or face or nose. There were no cranial nerve disturbances, no cranial nerve injuries. He had no trauma to the head structures except I thought he sustained a mild strain on the capillary muscles on the right, and also a little strain of the right shoulder joint. He had a little strain of the muscles there, from which he had recovered.

Then he had this back strain, which was probably a lumbo-sacral affair and probably some left sacro-iliac. I don't think he had any serious cord injury or any serious disk injury.

(Testimony of Ross Sutherland)

The congenital anomaly I think predisposes to his injury, makes him more easy to have a back injury, as his past history shows. [91]

The rest of the general examination was negative.

He had a slight first degree round back for a full range of motion.

Q. What do you mean by first degree round back?

A. On standing his back is a little more round than normal. He doesn't maintain his curve. It is a postural condition.

Q. And that comes from —

A. That is from childhood.

Q. The way he used to sit?

A. That is right. And sometimes it is a family background. But it is all a postural condition.

There was no disease in the spine or arthritis. He had a normal lumbar curve and there was no lumbar spasm.

I thought he was a little tender over the superior angle of the left sacro-iliac joint. There was no sciatica. I found no clinical findings of the disk.

He was a little tender along the ligaments from the superior angle of the left sacro-iliac joint over to the lumbo-sacral.

The right straight leg raising was free. The left straight leg raising was very slightly limited, about 60 degrees.

Q. You mean you were able to flex the leg to 60 degrees? [92]

A. That is right.

There was no apparent or real shortening of the lower extremities, and no acute lumbosacral symptoms at the time I examined him on the 13th.

(Testimony of Ross Sutherland)

Q. Did you find any spasm?

A. I demonstrated no spasm except what Dr. Mc-Reynolds testified to, on extreme movements to the left he was conscious of it but I didn't feel any particular spasm.

On sitting his spine was straight and there was no spasm, and he got on and off the examining table without any discomfort whatsoever. He walked without a limp.

Q. Do you see any reason why this man shouldn't follow his occupation if he wants to?

A. No, I think the man can follow his occupation, and he is going to have further back strains as he gets older because all these congenital low backs, even with minor anomalies, they are more predisposed to strain and weakness as they get older.

Q. You mean that condition will come on irrespective of this alleged accident that he had, or the accident that he had?

A. Any case with anomalies of the lumbosacral joint develop back strains and aches as they get older without any increase.

Q. Do you think then that the accident that he had has [93] anything to do with his back strains or the pains and aches that develop and will develop in the future?

A. No, I think this man will get over it. He apparently got over his injury that he had on 12/6/46. That shows right there he had a minor strain. He was off a few days. He will probably get over this one and later on he might, just by stepping off a car or lifting something, have another back strain. These low back

(Testimony of Ross Sutherland)

congenital anomalies have typical histories and sometimes they get quite disabled, but it is not from any one particular accident.

Q. In other words, irrespective of whether he ever had an accident, his condition in all probability would develop in the future?

A. Yes. He may go for many years or months and then he might have a lot of back trouble.

Q. That could come just from his normal work?

A. Yes. When a man of 25 starts having back symptoms with a minor anomaly, the prognosis is not particularly good for heavy manual work around the age of 40.

Mr. Collins: That is all.

Cross Examination

By Mr. Brobst:

Q. Doctor, would the removal of tonsils improve his condition?

A. Not necessarily. That is speculative because [94] we never take them out unless they have some secondary aggravation from a focal infection. In this particular case his sedimentation is entirely normal. In this particular case his sedimentation is entirely normal. He doesn't show any evidence of focal infection. His Wasserman is normal. His sedimentation is normal. The blood count is 93 per cent, reds 5 million, 90,000, and white 6100, so he isn't carrying around any focal infection.

Q. Would removal of the teeth help any?

A. Sometimes if they get an infected tooth and you get a back strain you take it out.

(Testimony of Ross Sutherland)

Q. That isn't indicated in this case, either removing of tonsils or removing of teeth?

A. I didn't see any indication from his lab work. Of course abscesses are not particularly good in the recovery of back injuries.

Q. Well, now, Doctor, the fact is that the way the man's back is now you wouldn't advise him to go on into heavy labor, would you?

A. I would advise him to wear a girdle and gradually work back into his regular work within a few weeks.

Q. You would suggest that a girdle be worn?

A. Yes. They get weakness from disuse, an active man of 25 just sitting around.

Q. You got a history from him that he was in the San [95] Francisco Hospital for about three weeks, didn't you.

A. Yes. My history was that he had twisted his club and it broke and he was twisted up against a tank car. He was taken to the S. P. Sanitorium and X-rayed. He went home and went to bed, the following day starting treatments, outpatient therapy, sent to S. P. Hospital at San Francisco for two weeks. You see, this man has never been down very long for any particular symptoms.

Q. He has a history of a continuous course of treatment though?

A. Yes, and he has been ambulatory all the time. He also had three teeth extracted.

Q. He had his tonsils taken out too.

A. If you have any focal infection you just don't get better. That lab work of mine was done on 8/2.

Q. The fact that he has is more susceptible to injury than a normal back? A. Yes.

(Testimony of Ross Sutherland)

Q. And once you get an injury it is harder for you to recover than if you have a normal back?

A. Yes, on account of the fact that he has a predisposed weakness to begin with.

Mr. Brobst: I think that is all.

The Court: You are excused. [96]

(Witness excused.)

Mr. Collins: I would like to have the other gentleman back now.

The Court: Do you want to recall the doctor?

Mr. Brobst: I wonder, your Honor, if we could take the afternoon recess and I will see if I can find him.

The Court: We will recess for 10 minutes.

(Short recess.)

VALNEY BARNETT

recalled as a witness by and in behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Brobst: You have been sworn before.

The Clerk: Your name is?

The Witness: Valney C. Barnett.

Direct Examination

By Mr. Brobst:

Q. Out there at the Tucson yards, have you seen the supply man make any examinations or tests of those clubs? A. I have not.

Mr. Collins: That is objected to as incompetent, irrelevant and immaterial.

The Court: He said he had not. Overruled.

(Testimony of Valney Barnett)

By Mr. Brobst:

Q. What is the practice out there as far as giving these men the clubs with reference to whether or not any test [97] is made by the supply man or whoever has charge of them for the company?

Mr. Collins: That is objected to on the ground that this man can't possibly be present to know what tests are made before they are given to the men. All he knows is that he picks up a club and goes to work with it. He is not in the supply department.

The Court: What have you to say about that?

By Mr. Brobst:

Q. Mr. Barnett, out there at the Tucson yards have you observed the supply man receiving these clubs and putting them out for the men to use?

A. Well, I have seen him put them out.

Q. What do they do as far as he is concerned?

Mr. Collins: That is objected to as wholly immaterial, if you Honor please.

The Witness: The clubs come in—

The Court: Overruled. Go ahead.

The Witness: The clubs come in a heavy burlap bag, sewed on both ends, and they are set out there in a container for you to pick up and take, and it is up to us to open the bag that they are in.

By Mr. Brobst:

Q. As far as any test being given by the supply man who puts them out, state whether or not any is given. [98]

Mr. Collins: That is objected to as calling for a conclusion of the witness. He can't possibly know what tests have been made on those clubs.

(Testimony of Valney Barnett)

The Court: He asked him if he did any, if he observed any tests.

By Mr. Brobst:

Q. Did you see or observe any tests being made by any of the supply men at any time while you were working out there at the Tucson yards?

A. I have not.

Q. The clubs that are furnished to the men, are they all new clubs or some used clubs?

Mr. Collins: That is objected to as wholly immaterial.

The Court: Overruled.

The Witness: Well, they are new clubs to begin with and a lot of times they are used and put back in the container and used again the next day.

By Mr. Brobst:

Q. So that you have a selection of both used and unused clubs, is that right?

A. That is right.

Mr. Brobst: I have no further questions.

Cross Examination

By Mr. Collins:

Q. Do you know what the normal life of one of these [99] clubs is?

A. It depends on your job.

Q. It depends on how many times they use the club to knock the dog off of a brake staff?

A. That could be true.

Q. You fellows use them for that purpose?

A. Yes, sir.

Q. They are only supposed to be used to tighten up the brake wheel?

A. That is right.

(Testimony of Valney Barnett)

Q. But you trainmen come along and take the club and use it for a hammer, do you not?

A. I have seen some of it in the service but very little of it in the yard service.

Q. When you have a club it is for you to determine whether or not the club is a fit club or not?

Mr. Brobst: I will object to that. That calls for his conclusion.

The Court: Sustained.

Mr. Collins: That is all.

Mr. Brobst: That is all. Thank you very much.

(Witness excused.)

Mr. Brobst: That is all, your Honor. The plaintiff will rest.

Mr. Collins: We have just the one witness here to-[100] day and we will put him on, if your Honor please.

ROBERT ADAM GRAHAM

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Robert Adam Graham.

Direct Examination

By Mr. Collins:

Q. What is your business, Mr. Graham?

A. Assistant chief chemist, Southern Pacific Company.

Q. Do you have under your supervision the making of tests of brake clubs that are used on the road?

A. Yes, sir.

(Testimony of Robert Adam Graham)

Q. Now do you know from whom the brake clubs are purchased? A. Yes, sir.

Q. What company?

Mr. Brobst: I will object to that, your Honor, as wholly immaterial.

The Court: Sustained.

Mr. Collins: I wonder, your Honor, in the absence of the jury if I could have your Honor read an authority?

The Court: It isn't necessary for me now. Where you purchase your materials from in the operation of your railroad is not material. [101]

Mr. Collins: I want to know from whom they purchase it. I don't like to discuss this in the presence of the jury.

The Court: The jury may be excused for a few minutes, I will hear what you have to say.

(The jury retired from the courtroom at 3:30 o'clock p. m.)

The Court: Go ahead.

Mr. Collins: The defense in this action, if you Honor please, is that these clubs are purchased through a reputable manufacturer and as such we have a right to rely upon the manufacturer sending us an instrumentality constructed safely for the purpose for which it is to be put.

In this case of *Lowden v. Hanson*, 134 F. (2d) 348, that identical point was raised, and which involved the purchase of a switch standard.

It is the position of the railroad company in this case, and I must have indicated that on cross examination

of the plaintiff, so far as he was able to observe this club showed no flaws. Now by this witness we expect to show that we bought from a reputable firm. We expect to prove by witnesses here in town that they are a reputable firm, a reputable manufacturer. When that has been established, as I will read from this authority, that is about the extent to which we have to go in the defense of this case.

The Court: Who was the judge that wrote that opinion? [102]

Mr. Collins: This is an action that was brought on a switch standard which broke when the switchman attempted to throw it. In this case of course we have a switchman's club. The Court said:

"As employers they (the railroad) were under the duty of exercising ordinary care in furnishing the plaintiff with reasonably safe appliances with which to work and a reasonably safe place in which to perform his services. But this was not the limit of their duty toward the plaintiff. They were under the continuing duty or exercising ordinary care to see that the instrumentalities and appliances furnished for the use of plaintiff, as well as the premises where he was required to work, were maintained in a reasonably safe condition * * * It was, therefore, their duty to have the appliances so furnished inspected from time to time. Here it appears from the undisputed evidence that this spring switch stand was one of standard make, in general use and manufactured by a reputable manufacturer. When received and installed it was in the nature of a unit and not dismantled; that there was no evidence that it was not properly installed so that in

the first instance it cannot be said that the defendants failed to exercise ordinary care in supplying, furnishing and installing this equipment * * * Of course, the rule could not be invoked if the appliance or equipment were patently and openly defective."

You will remember on my cross examination of the plaintiff he said it was not defective, that there was nothing that he could see. The burden then shifts to us to establish where we got it and whether the manufacturing company is a reputable one.

Then the Court goes on:

"But there was nothing about this finished product indicating to the naked eye that it was at the time it was installed deficient in any particular, and no one is required to guard against that which a reasonably prudent person under the circumstances could not anticipate as likely to happen; the equipment having been purchased from a reputable manufacturer, we are clear that the defendants could not be charged with negligence because of any structural or inherent defect which was not patent at the time of its installation. Defendants were warranted in assuming in the absence of any notice to the contrary, that the equipment was without structural defects, and it was not incumbent upon them to dismantle the appliance and separate it [104] into its various parts for the purpose of discovering possible defects. It was manufactured, assembled, inspected and tested by experts before it was ever placed upon the market. This was implied from the fact that the manufacturer was a reputable one. While it was the duty of defendants to inspect

this appliance, it is our view that in the absence of any evidence that it was not properly functioning, defendants were not required to dismantle the appliance and submit it to a microscopic inspection * * *

So the only defense I have in this case is that it was bought from a reputable manufacturer.

The Court: Who is the judge that wrote that opinion?

Mr. Collins: Judge Gardner.

The Court: A district judge?

Mr. Collins: The United States Circuit Court of Appeals.

Now, then, counsel knows that my position is correct. He likewise knows that this isn't the only authority on this subject.

Now what would be our next procedure in this case in direct sequence of what we are going to prove in this case in our defense? First that we bought from a reputable manufacturer; proof by our people that they are reputable; proof by others who have been dealing with them. Second, that they delivered it in the regular course of business to us. That [105] presumption then continued under this authority that it had been properly inspected as coming from a reputable manufacturer.

Now the Southern Pacific goes further than that. We follow the principle of taking a certain percentage of the clubs and making a further test. Those tests which we make on any group of clubs completely destroys the club which we make the test upon, completely destroys it for any further use in the operation of a railroad. So when counsel makes an objection to the name of the manufacturer, which is only preliminary to prove whether or not he is a reputable manufacturer, and the

Court sustains that objection you take away from us one of our pleaded defenses.

Mr. Brobst: I have never read this decision, your Honor, and I am not familiar with any other cases. The only cases that I am familiar with hold directly the opposite, particularly in a case of this kind where the club was stated to have been a used club and where they put it back into use for this man to use.

There might be something in the point that if they come in there brand new and they put them out to use, but even then when they are supplying a man with an instrumentality which, if defective when used is a dangerous instrument, if those cars had been moving the man could have been thrown beneath the wheels and killed, so it isn't an ordinary tool, it [106] is a tool that if it isn't proper it is extremely dangerous to use.

As I say in this case who it was purchased from becomes immaterial when it is a used club. This is a case where a switch stand was put up that had to be dismantled if it was to be inspected underneath and, as I understand it, something in the mechanism inside broke. This doesn't have to be dismantled to be inspected.

The evidence by the yardman, who had had some 40 years of experience, is that that was a lightweight club and should not be used, and the only time he ever saw it was when he walked in the room and I put him on the witness stand in less than a minute's time.

In view of the fact that this is not a new club and it is a used club, even this authority would not cover because nothing had to be dismantled. It is a club that can be inspected by looking at it, lifting it and testing it. It certainly seems to me that where it was manufactured disappears out of the case after it becomes a used club and is put back in use.

Mr. Collins: Apparently, your Honor please, counsel has not read this authority. This is a case decided in 1943, subsequent to the amendment of 1939.

In this case a switch standard becomes second-handed the day that it is put in operation. They held in this case that [107] the railroad company was liable because there was a simple method of making a test on this, and that was by tapping it, but that the evidence as to where they bought it, whether it was a reputable firm, becomes a primary factor in determining defense in this character of cases.

Now, then, I can only show care on the part of the railroad company, first by showing the care in which we selected the club, secondly, the tests that we made, the examinations we made. I have already proved from the lips of their own witness that there was no visible defect — both of them. I expect to go further and prove that this club is within the category of clubs which I have described to your Honor from this manufacturer.

The Court: Are you through, gentlemen?

Mr. Brobst: Yes, your Honor. I will submit the matter.

The Court: If a railroad company is relieved from liability or negligence because it has purchased its equipment, or any part of it, from a reputable manufacturer who furnishes it, then you can never recover in an action against a railroad company under any condition. If a man is riding on a railroad car and the wheels under the car break, causing the injury, the railroad company could come in and say, we purchased it from a reputable manufacturer and therefore we are not liable. You could mention instance after instance. If it is a defense for a railroad company to come in and say, we purchased [108] our appliances or our equipment that

prove to be inefficient at the moment of the accident, from a reliable concern, then there never can be a liability on a railroad company. That would foreclose it right there. That is not the law.

This railroad company assumes to use at the time that the accident occurred efficient appliances and equipment to protect the public and its employees. That is fundamental under the law. If it is not the case, then you can never recover from a railroad company in any instance. All they would have to do is show what you are attempting to show here, that they purchased the appliance that brought about the accident, that showed it was defective at the time, and then you cannot recover. That is not the law. That is not justice. That is the responsibility that the railroad company takes as railroads to protect the public in the operation of its road and in dealing with the public. If not, I could name you instance after instance in the appliance of a railroad company, from its equipment from the engine to the last car where they could say, we purchased it and we didn't know the appliance was defective or deficient, therefore we are not liable because we purchased it from this great manufacturing company, which is a reputable company. A railroad company is not relieved under those conditions. They assume the liability to protect the public and protect the employees that they will use efficient appliances in the operation of their road. That, to my [109] mind, has always been fundamental in the law in actions of this character.

Mr. Collins: I appreciate your Honor's view, but —

The Court: If I permit you to go ahead and show that you bought this club from a reputable manufacturer and therefore you didn't know it was weak, didn't know it was not strong enough to do the work that you ex-

pected this man to do, then there could be no recovery if I permitted you to do that, none whatever.

Mr. Collins: May I be heard now?

Your analogy with reference to the car breaking or rails breaking was tried out, and I have the authorities here for your Honor. In this same district just two weeks ago we had such a case which we won. Mr. Hildebrand tried the case and lost it.

Mr. Brobst: That isn't correct. The rule there is different. There there was a question where they used reasonable inspection, and showed that reasonable inspection couldn't discover the defect, which is all right. I have no quarrel with that.

Mr. Collins: I cannot control your Honor's ruling, but if you are going to preclude me from introducing this evidence, then I expect to make an offer of proof.

The Court: I am not denying you the right to proceed in any way you wish, but I have to rule as I understand the law [110] to be.

Mr. Collins: I would like to have until tomorrow morning to cite you additional authorities directly in point.

The Court: As I say, if they show that a Pullman car was purchased from a reputable company, although at the time of the accident it gave way, it wasn't sufficient to protect the public, I do not think that that is the law.

Mr. Collins: Of course I agree with you, but I would like to have the opportunity to convince you through the words of the higher courts, if I may have until tomorrow morning.

The Court: To cite a case like you have here, where you use an appliance, such as in this instance a club, which you furnished this man and gave him to use, and the only thing he can use it for is to help run your

road, and it gives way at the time, and the defense was because it was purchased from a reputable company that therefore you are not liable, why I cannot understand that that is the law at all.

Mr. Collins: I read it to you from the Circuit Court of Appeals decision.

The Court: Let some other Court of Appeals rule on it. I do not understand that that is the law at all.

You may proceed. I have ruled. I have sustained the objection. I am satisfied that that is the responsibility of a railroad company, to furnish efficient, safe equipment to [111] protect the public and its employees in its operation.

Mr. Collins: You mean an absolute duty? Is that what you mean?

The Court: They have to furnish it because here a man who had a club that you purchased for him, he used it, it broke right in two — we have it in evidence here — and now you come in and say, we will show we bought that club from a reputable company and we have the right to rely on it, that is your defense, that is not the law. The way I understand it, it is not the law and I never rule that way.

Mr. Collins: I can't help that. I still agree with that decision.

The Court: It is natural for lawyers to disagree with courts. That is only natural. But fundamentally that is not right and that is not the law as I understand the law.

Mr. Collins: I do think that your Honor is rather arbitrary.

The Court: I am not arbitrary at all.

Mr. Collins: To give me until tomorrow morning to produce additional authorities to show my position is not only right but tenable.

The Court: I have gone over these matters before, counsel.

Mr. Collins: So have I, for 30 years.

The Court: That does not make any difference. I have [112] gone over them and I have ruled in cases where a Pullman car was defective, went to pieces, and the railroad company was held liable in that case. Here you have a club that is being used, it breaks while this man is using it, an employee, and your contention is that the railroad company is not liable because they purchased it from a reputable manufacturing company.

Mr. Collins: I am showing that we used reasonable care in furnishing the appliance.

The Court: Do you claim that that is reasonable care and that that is a defense?

Mr. Collins: I think that is one of the defenses, showing reasonable care. It isn't the whole defense.

The Court: If I permitted this, that you were not responsible because you purchased it from a reputable company, therefore the company really shouldn't be held liable, that would be your argument if I permitted evidence on that, I do not understand that that is the law at all, gentlemen.

Mr. Collins: May I have until tomorrow morning to give you additional authorities?

The Court: Have you any authority of the Supreme Court of the United States?

Mr. Collins: There is one referred to here that I would like to go and look up and see what it says.

The Court: I never heard of it before, that that is a [113] defense. I never heard of it before, because you could never recover against a railroad company if they can come in here and show that they purchased from a reputable company the appliance and rely on

that and therefore if the public or an employee is injured by reason of its defectiveness at the time, then under your contention there can be no liability because of this purchase from some reputable company or manufacturer.

Mr. Collins: If your contention is correct, then the minute the club breaks the doctrine of *res ipsa loquitur* comes in and the presumption of negligence arises.

The Court: I am just saying that the railroad company is liable at the time of an accident if its equipment is defective and is the proximate cause of that accident. I say that that is fundamentally the rule. That is my ruling.

Mr. Collins: Your Honor hasn't told me whether I may have until tomorrow morning to cite further authorities.

The Court: Well, it is 20 minutes to 4:00. I will give you until tomorrow morning, but I will tell you that my mind is in that condition now. If you want further time until tomorrow morning I will give you until tomorrow morning.

Mr. Collins: Thank you.

The Bailiff: Shall I bring the jury down?

The Court: Yes.

(The jury returned to the courtroom at 3:45 [114] o'clock p. m.)

The Court: I will state to you, ladies and gentlemen of the jury, that we will take a recess until 10:00 o'clock tomorrow morning. You are excused until then. Remember the admonition.

(Whereupon, at 3:45 o'clock p. m., a recess was taken until 10:00 o'clock a. m., August 28, 1947.) [115]

Los Angeles, California; August 28, 1947;
10:00 o'clock A. M.

Mr. Collins: Your Honor please, the witness on the stand I would like to, if you don't object — counsel does not object — withdraw him and put one witness on who is a businessman.

The Court: Yes, but I have to dispose of this objection that is before me.

Mr. Collins: Yes, your Honor.

The Court: Since adjournment last evening I made a further examination of the pleadings and the Federal Employers Liability Act, under which this suit is brought, and I discover in the complaint that the plaintiff alleges, as a specific act of negligence, that the defendant did not use ordinary care in providing him with a safe appliance, which is this brake club, with which to perform his work, and therefore the plaintiff alleges that that was the act of negligence.

Now the defendant takes issue with the plaintiff in his answer, denies that fact, so the question of ordinary care is of course an issue of fact to be determined by the jury. That being the case I will modify my ruling sustaining the plaintiff's objection to asking the witness who was on the stand the question as to from whom this brake club was purchased and its condition. I think they have a right to go into that, as to whether they used ordinary care and if it was safe, [117] which is an issue of fact to be determined by the jury. So I will modify the ruling, for the record.

The objection was made and I sustain the objection. I will overrule the objection and permit the witness to answer.

Mr. Collins: Mr. Brobst, rather than call the witness back, if you will take my word for it that the answer would be the Turner, Day & Woolworth Handle Company?

Mr. Brobst: Yes, Mr. Collins.

The Court: That is his answer?

Mr. Brobst: Yes.

Mr. Collins: That is a division of the American Cork and Pulp Company. I will verify that later on when he comes back.

Mr. Brobst: All right.

Mr. Collins: Now if I may be permitted to call a witness out of turn?

The Court: Very well.

Mr. Collins: Mr. Knight, please.

KENNETH W. KNIGHT

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Kenneth W. Knight. [118]

Direct Examination

By Mr. Collins:

Q. Mr. Knight, what has been your business over the last 10 years?

A. I have been connected with wholesale hardware.

Q. Were you a purchasing agent?

A. I have been connected with purchasing wholesale hardware for the last five years.

Q. And in connection with that position of yours, did you have occasion to learn from the trade the reliability or the reputation of various manufacturers?

A. Yes, sir.

(Testimony of Kenneth W. Knight)

Q. I ask you whether or not you are acquainted with Turner, Day & Woolworth Handle Company, which is now a division of the American Cork and Pulp Company?

A. I am.

Q. Over what period of time?

A. Directly for two and a half years as assistant to the purchasing agent at the California Hardware, at which 100 per cent of our handles were bought from Turner, Day & Woolworth.

Q. I assume you have also had transactions or correspondence, together with consultation with other manufacturers of hardwood handles, such as brake clubs, axe handles, hoe handles and such? [119]

A. Yes.

Q. I will ask you whether or not by reason of your experience in the relationship with the trade whether the Turner, Day & Woolworth Handle Company is a reputable firm.

A. Yes, they are.

Q. And can you state whether or not it is a manufacturer of recognized standard among the trade?

A. That is right; they are.

Q. And in your opinion will you state whether or not that manufacturer is a company that can be depended upon to produce, I should say send to the trade, reputable, substantial standard products which you purchase from them?

Mr. Brobst: I will object to that question, your Honor, on the ground it is argumentative. I have no objection to the reputation but whether they can be depended upon is argumentative.

The Court: I think it is argumentative. Sustained.

(Testimony of Kenneth W. Knight)

By Mr. Collins:

Q. What, in your opinion, is the reputation and dependability of the Turner, Day and Woolworth Handle Company?

A. They have a reputation of furnishing a first-rate handle of all types.

Mr. Collins: You may cross examine.

Mr. Brobst: I have no questions.

(Witness excused.) [120]

Mr. Collins: Will you have Mr. Graham resume the stand?

ROBERT ADAM GRAHAM

recalled as a witness by and on behalf of the defendant, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. Collins:

Q. You have been sworn before, Mr. Graham?

A. Yes, sir.

Q. I think yesterday you stated you were employed by the Southern Pacific Company? A. Yes, sir.

Q. In what capacity?

A. Assistant chief chemist.

Q. I will ask you whether or not you have under your supervision the testing of all brake clubs which are purchased by the Southern Pacific and subsequently distributed to the various points where they are used.

A. Yes, sir.

Q. How long have you been with the Southern Pacific? A. Thirty-four years.

Q. Will you tell the jury—

A. Pardon me, 24 years.

(Testimony of Robert Adam Graham)

Q. Will you tell the Court and jury, if you will, what has been your education?

A. High school, business college, and I started in the [121] mechanical department of the S. P., the superintendent's office, and I transferred to the chemical laboratory.

Q. How long did you study in the chemical laboratory?

A. I was classed as laboratory assistant and typist. In those days the office work didn't take a great deal of time. I was making routine tests in the laboratory, oils, and occasionally testing handles and steel.

In 1937 I went direct to the inspection of material purchased for the S. P., and every purchase the Southern Pacific makes they demand inspection before it is used.

Q. Now with respect to brake clubs, do you personally supervise the inspection of all shipments of brake clubs? A. I do.

Q. And all brake clubs when they go out on the system have been personally inspected by you, is that correct? A. That is correct.

Q. Now will you tell the jury, or state to the jury if you will, please, how the inspection is made, what procedure is used?

A. We get notice from our store department that a new shipment has been received. It is a special form that is submitted to us. We go over to the storehouse and pick at random 20 per cent of the shipment of the brake clubs, either in crates or sacks.

Mr. Brobst: I will object to the testimony, your Honor, [122] in view of the fact that he states that

(Testimony of Robert Adam Graham)

20 per cent are inspected; unless his inspection is limited to the club in evidence it would become immaterial.

The Court: I think that that has some relevancy as to just what the company does in using ordinary care. Overruled.

By Mr. Collins:

Q. Do you take each shipment as it comes in, is that correct? A. That is correct.

Q. And before any of the clubs are shipped out, in so far as any particular shipment is concerned, do you stamp that shipment as having been inspected by you?

A. We have to.

Q. I want you to go into detail as to the method of inspection, the tests that you make—just a moment before we ask that question.

Do you make an inspection of each club in the shipment? A. No, sir. That is impossible.

Q. Now state to the jury in detail the inspection that you make, whether it is one or two kinds, whatever you may do.

A. After visible inspection of the shipment is taken at random, six clubs out of each shipment are brought into the testing laboratory.

Q. How many in a shipment?

A. It depends on what the order is, according to their [123] consumption.

Q. You take a percentage?

A. Yes, sir. There is one correction. I said 20 per cent. It is one out of every 20, which is equal to 5 per cent. That is universal testing practice.

(Testimony of Robert Adam Graham)

Q. Now state what you do.

A. We bring these clubs into the laboratory, check them for their breaking strength, their deflection from the center axis; in other words, we place them in a large machine that fixes the end of the club and the handle end is raised with a traction dynamometer—is similar to a scale—and the force exerted on that club is measured. We measure the actual breaking strength of the club.

We also measure the deflection of the club from the time we start the test to the first evidence of breakage.

When what we have found constitutes a good club we hold to that standard.

Q. What pressure do you exert upon a club, or I should say what pressure do you insist a club should stand before it is passed or before any of that shipment is passed? A. At least 500 pounds.

Q. Now in the event you find a defective club from the tests which you make from a shipment, then what if anything do you do?

A. We return to the shipment and go through them very [124] carefully because we allow no defects in a brake club.

Q. You mean by that that if you find in the entire shipment just one club you condemn that shipment until further inspection?

A. Well, we wouldn't condemn it, we would go through it ourselves, or at least go through another 5 per cent. If we found a second one we would go through the entire shipment.

Q. Now when you make this test, can you make a test such as you have described on each and every club in the shipment? A. No, sir.

(Testimony of Robert Adam Graham)

Mr. Brobst: I object to that, your Honor. That is a question for the jury.

Mr. Collins: That is merely preliminary, if your Honor please.

The Court: Overruled. It is preliminary.

By Mr. Collins:

Q. You say you cannot? A. No, sir.

Q. Now will you state to the jury why you cannot make a test on each and every club in the shipment to determine its tensile strength?

Mr. Brobst: I will make the objection to that also, your Honor. That is invading the province of the jury.

The Court: Overruled. [125]

The Witness: Well, if you tested every club—when we test them we destroy them for further use. I think that answers it.

By Mr. Collins:

Q. In other words, when you make a test on a club that club cannot be used? A. It cannot be used.

Q. And if you made a test on each and every club it would destroy the entire shipment?

A. That is right.

Q. I take it then that you select at random 5 per cent of the clubs and make a test to determine whether or not they break at less than 500 pounds pressure?

A. Yes, sir.

Mr. Brobst: Are you going to put them all in evidence, counsel?

Mr. Collins: I don't know. I will have to ask him something about them.

Mr. Brobst: I have no objection to the pictures, your Honor.

(Testimony of Robert Adam Graham)

By Mr. Collins:

Q. I wonder if you will put these pictures in order, commencing at the beginning of the test, so that we may mark them one after another if they are admitted in evidence? A. There are three to a set. [126]

Q. Which are the first three?

A. These. They are numbered.

Q. These are just extra sets? A. Yes.

Mr. Collins: Do you want an extra set of these for your files, counsel?

Mr. Brobst: No, I don't think so.

By Mr. Collins:

Q. State whether or not in your experience the procedure which you follow with respect to inspection of shipments of brake clubs is the procedure which is generally followed and considered good practice throughout the railroad industry.

Mr. Brobst: I will object to that, your Honor. That is not the test.

The Court: Sustained.

By Mr. Collins:

Q. I hand you laboratory test No. 424-1. State what that represents.

A. That represents a handle as set up to make the original first test. It is a new handle. This is a big Olson test machine that we use to hold the club firmly in blocks there. This is a chain hoist with a traction dynamometer, which is equal to a scale.

Q. This is the gauge up at the top?

A. This is the gauge, yes. By the pull it registers [127] the pounds.

(Testimony of Robert Adam Graham)

Mr. Collins: Can we mark "G-1" as the position of the gauge?

Mr. Brobst: Whatever you say is all right.

The Witness: And we have here a steel rule indicating how far the center of the handle is from the floor. Force is applied by the chain hoist, raising the handle into a position as shown.

By Mr. Collins:

Q. Just a minute. That hoist is then in a position to raise the handle? A. To start the test.

Q. The test has not been commenced?

A. No, sir.

Mr. Collins: I offer this in evidence as defendant's exhibit next in order, your Honor.

The Clerk: That will be defendant's Exhibit A.

The Court: Admitted.

(The photograph referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Collins: May I hand it to the jury, if your Honor please? The Court: Yes.

(The exhibit referred to was exhibited to the jury.)

Mr. Collins: I understand, if your Honor please, under [128] the new rules no exceptions are necessary to be noted.

The Court: If that is the new rule, everything will be excepted to.

Mr. Brobst: Counsel, why not admit the whole series as one exhibit and pass them to the jury at one time so we can save time?

(Testimony of Robert Adam Graham)

By Mr. Collins:

Q. What is this laboratory test No. 424-2? Will you explain it to the jury in detail?

A. It is a close-up view of the point of application of force. It shows the end of the handle, where a bolt is placed through the center so the handle will not slip in making the load application.

Q. What is this ruler off at the end?

A. This rule is for measuring the height from the floor. This is more or less to give you an idea how far in from the end of the handle that the load application is made.

Mr. Collins: I offer this as defendant's exhibit next in order.

Mr. Brobst: Why not admit it as one exhibit?

Mr. Collins: I would rather keep them separate.

The Clerk: Defendant's Exhibit B in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit B.) [129]

By Mr. Collins:

Q. Now laboratory test No. 424-3, will you explain what that picture shows?

A. That picture shows the club after load has been applied but before fracture. You will note that it is deflected from the center line of the axis about six inches.

Mr. Collins: I offer this as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant's Exhibit C in evidence.

(The photograph referred to was received in evidence and marked Defendant's Exhibit C.)

(Testimony of Robert Adam Graham)

Mr. Collins: I will pass these to the jury.

(The exhibits referred to were passed to the jury.)

By Mr. Collins:

Q. Now, Mr. Graham, will you examine the brake club that is before you?

By the way, that club has not been introduced in evidence, if your Honor please.

Mr. Brobst: Yes, I put it in.

The Clerk: It is plaintiff's Exhibit 1.

By Mr. Collins:

Q. Will you make an examination of plaintiff's Exhibit 1? A. Yes, sir. [130]

Q. Have you already examined it? A. I have.

Q. Have you examined it in the laboratory at Sacramento? A. I looked at the fracture.

Q. I will ask you whether or not, outside of putting this club in a machine such as you have demonstrated in defendant's Exhibits A, B and C, whether or not there was any way to determine whether or not there was any flaw in this club. A. No, sir.

Q. I will ask you whether or not the wood from the outside would pass inspection, or would you have passed it as a good and sufficient club? A. I would.

Q. How can you tell the jury in your opinion what caused this club to break?

A. Not knowing how it was applied, from the appearance of the wood itself, rather short in fibre, which an inspection couldn't tell without breaking, there is no surface indication. The short end fibre means it is a little bit weak. In combination with the application it

(Testimony of Robert Adam Graham)

might have caused a failure. I notice here some new gashes and the method of applying it might not have been the proper manner.

Q. But in any event of course you don't know how it was [131] applied? A. No.

Q. There is no way of discovering the defect of this club prior to the time it was broken other than taking the club and putting it in a machine and breaking it in half? A. No, sir.

Mr. Collins: You may cross examine.

Cross Examination.

By Mr. Brobst:

Q. How much pressure does the ordinary brakeman exert on a club such as that?

A. That is something that has never been determined.

Q. You have never determined that?

A. No, sir.

Q. Yet you say that a safe test would be 500 pounds?

A. That is what we have taken for granted.

Q. Have you just fixed that standard without knowing how much pressure the ordinary man exerts on one of these during the course of his ordinary work?

A. Well, I am not in that department. I wouldn't know unless I actually made tests.

Q. Then you just determine these things are safe by some standard that is given to you?

A. So many factors enter into it, your deflection, your braking load. Of all the tests made the average is 800 [132] pounds per club. It varies according to the clubs.

Q. You said 500.

(Testimony of Robert Adam Graham)

Q. 500 is the minimum. Anything below 500 we wouldn't accept.

Q. But you fix that standard without knowing what the requirements are of the men in the field, how much pressure they exert when they have to fasten up one of these brakes? A. That is not known.

Q. So then actually you don't know whether it is safe or not out in the field because you don't know whether or not they exert more than 500 pounds when they have to tighten up one of these brakes on freightcars on a grade?

A. The only thing we can go by is the past record to get the best handle we can.

Q. After a brake club has been used and put back you don't then give it a second test, do you?

A. No, sir.

Q. What use it has been subjected to you have no way of determining? A. No.

Q. Then the supply man on the job gives it no test?

A. I don't know.

Q. So that it is used, or rather it is put back in a can and no matter what its condition is it is put back for the other men to use? [133]

A. That is out of my department.

Q. You don't know anything about that?

A. Not the road use.

Q. As far as any test is concerned at the actual scene where the club is used and reused, you know nothing about those tests? A. That is right.

(Testimony of Robert Adam Graham)

Q. And these clubs are sent out as being safe when you take one, out of 20 and if it passes inspection the other 19 go out to be used?

A. That is universally accepted with all inspection.

Q. Whether or not they are going to exert more than 500 pounds on each club, you don't know that?

A. No, sir.

Mr. Brobst: That is all.

Mr. Collins: That is all.

(Witness excused.)

Mr. Collins: Mr. Estes.

LESLIE ARTHUR ESTES,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Leslie Arthur Estes.

The Clerk: How do you spell your last name?

The Witness: E-s-t-e-s. [134]

Direct Examination.

By Mr. Collins:

Q. Mr. Estes, your business is what?

A. Head buyer.

Q. For whom? A. Southern Pacific Company.

Q. Over what period of time?

A. I started in 1913 and for the past 15 years approximately I have been head buyer.

Q. Do you have under your supervision the purchasing of brake clubs? A. Yes, sir.

(Testimony of Leslie Arthur Estes)

Q. For what period of time?

A. Possibly 15 years.

Q. From whom do you purchase those?

A. Throughout that period we have been buying from the Turner, Day & Woolworth Handle Company.

Q. Have you had occasion to discuss the purchasing of brake clubs from other firms?

A. Yes, sir. During that period other concerns have desired and have submitted prices on brake clubs that in some cases have been lower than the brake clubs that we buy from Turner, Day & Woolworth, but we have refrained from considering such purchases due to quality that we have been getting from Turner, Day & Woolworth Handle Company. [135]

Q. In the trade, do you know anything about the reputation of Turner, Day & Woolworth Handle Company?

A. To my knowledge they are considered one of the leading tool handle manufacturers.

Q. When you say tools, are you including brake clubs?

A. That answer includes brake clubs; yes, sir.

Q. Now do you know whether or not they are a manufacturing concern of recognized standing?

A. Yes, sir.

Q. I will ask you whether or not, in conjunction with the United States Department of Commerce, or with the United States Department of Commerce you carried on an investigation and recommendation as to the kind of wood to use in brake clubs and other wooden instrumentalities.

Mr. Brobst: I will object to that as immaterial, your Honor.

(Testimony of Leslie Arthur Estes)

The Court: Why is that material?

Mr. Collins: To show we have complied with those rules.

Mr. Brobst: That is immaterial as to what rules they comply with.

The Court: He may answer.

By Mr. Collins:

Q. Will you answer, please?

A. Would you repeat the question?

(The question referred to was read by the reporter as [136] follows:

“Q. I will ask you whether or not, in conjunction with the United States Department of Commerce, or with the United States Department of Commerce you carried on an investigation and recommendation as to the kind of wood to use in brake clubs and other wooden instrumentalities.”)

The Witness: That is a fact.

By Mr. Collins:

Q. I will ask you whether or not this is—counsel has agreed I need not have this certified to.

The Court: Very well.

By Mr. Collins:

Q. —if this is the United States Department of Commerce, under direction of Henry A. Wallace, National Bureau of Standards, which was put out by that department with reference to hickory handles.

Mr. Brobst: I will object to that, your Honor, unless it shows that it pertains to brake clubs.

The Court: Yes, if it relates to this brake club.

(Testimony of Leslie Arthur Estes)

Mr. Collins: I don't think it mentions brake clubs specifically. It has to do generally with hickory handles.

Mr. Brobst: Axe handles and things of that kind which I don't think apply here.

The Court: Sustained. [137]

Mr. Collins: I wonder if we could have a 10-minute recess while I read this over and see if there is some question or if it is admissible, your Honor. It is quite long and I just received it this morning.

The Court: Very well. We will take a recess for 10 minutes.

(Short recess.)

The Court: I will overrule the objection.

By Mr. Collins:

Q. I will ask you whether or not the handles which you purchase comply with these recommendations.

A. I couldn't intelligently answer that because the handles that we purchase are to our own specifications.

Q. Now the specifications used by the company, are they equal to or better or different?

A. That is something that our mechanical department would have to tell you.

Mr. Collins: I withdraw the question, if your Honor please. You may cross examine.

Mr. Brobst: I have no questions.

The Court: You are excused.

(Witness excused.)

Mr. Collins: Your Honor please, I may have one witness who is on his way up here, and he will be a short witness, not over four or five minutes. [138]

The Court: Is there any other witness you can use?

Mr. Collins: No, I haven't. That will be the completion of our case.

The Court: We will take a recess.

(Short recess.)

Mr. Collins: Your Honor please, may we now pass the club to the jury?

The Court: Yes.

(The exhibit referred to was passed to the jury.)

Mr. Collins: The witness is here, your Honor please, but he did not have the information I wanted, so I have excused him. However, I want to ask the plaintiff one question after the jury has examined the club.

The Court: Will counsel approach the bench a minute?

(Conference between court and counsel at the bench outside the hearing of the jury.)

The Court: I understand the defendant rests?

Mr. Collins: The defendant rests.

The Court: Do you have any rebuttal?

Mr. Brobst: No rebuttal, your Honor.

The Court: Both sides rest? (Assent)

Proceed with the argument. You are not limited in the argument, gentleman. You can have whatever time you want.

OPENING ARGUMENT IN BEHALF OF
THE PLAINTIFF.

Mr. Brobst: If the Court please, and ladies and gentle- [139] of the jury: This case, as I pointed out in my opening statement, is one that is very simple upon its facts. We have alleged here that the defendant company did not exercise reasonable care in supplying this man with a safe brake club, and because they didn't supply him with a safe brake club it broke and he was injured.

Now at the outset I want to say this to you: As far as the brake club is concerned, that is an instrument or a tool that must be safe or it becomes highly dangerous to life and limb. It is a fortunate thing in this case that the cars were practically to a stop at the time the club broke. If you can imagine for a moment, these men must go out and work in all types of weather, under all types of conditions, on all kinds of moving cars, and climbing up and down and using this club to set brakes on moving cars, so that his life depends and his limbs depend upon being given the tools to work with. And I was amazed this morning when they came in here and testified that they gave these clubs a 500-pound test and declared them to be safe when they didn't know how much force was exerted in the field by these men setting brakes on those heavy freight cars. They simply take an arbitrary figure and say that an instrument is safe when they don't even know the amount of strength and pressure that is used in the field by the workmen.

It seems to me that if they are going to be reasonably [140] safe, if they are going to give the men a fair chance to come out whole, they should at least have

a supply man or a man with experience who could put the club in between two even and give it a shove and a pull to see if it would stand the strength of the ordinary man. If it does, then it would be, I presume, some kind of a reasonable test. But they take one club out of 20 and if it stands 500 pounds of pressure, and they don't know how much they use in the field, they send the clubs out to be used without any further inspection. The supply man doesn't even lift them up to feel the weight.

I want to call your attention to this: Yesterday I brought in as a witness Mr. Jacobs. I never met the man in my life until yesterday. I walked into court with him and you jurors saw him come in here. I didn't take him out to the witness room. I asked him, would you look at the club and see if there is anything wrong with it, and I handed it to him. He handed it right back and said, "It is too light. It will break." And I said, "Take the witness stand."

You saw that. I asked him no more questions than that. He is a man of 40 years' railroad experience. He is a man who works in the yard. He is a man that pulled on those brakes, and a man who used that type of club, and it took him not more than three seconds when the club was handed to him to say that it was too light, that it would break.

Now why can't a supply man do that? Why can't he feel [141] them and test them before he puts them in the can? They don't even give them a test after they have been used and put back for the men to take out again. They come in off the road, they have been used, you don't know what type of use they have been given, you don't know what strains they have been put to, and

they put them back in the can and the brakemen have to use them again.

And why do they have to use them? Because these brakes will not work efficiently unless they use a club. So they are compelled to use the club that is not given any kind of an adequate test.

They will say, "Oh, we buy these out in the market from some manufacturer and we just take his word for it." They didn't even bring in testimony to show that this company guaranteed that those clubs were safe. They simply buy them on the market from a company that sells axe handles and puts them out for the men to use, taking one out of 20, giving it a 500-pound test, when they don't even know if these men exert 700 or 800 pounds. When a man has to tie down three freight-cars he will exert more than 500 pounds. Then if he doesn't stop the train, it may knock somebody off and they are killed. And they blame the man. They don't give him a strong enough club to hold it.

The club itself proves the point. If it was safe enough it wouldn't have broken right square in the middle. It is [142] just as clean a break as can be. Just as Mr. Jacobs said when he picked it up, and I put it in his hand, he just took it like that and said, "This is too light, it will break." And it broke right square across the grain.

Certainly he is no wood expert but he is a man who worked for 40 years for the railroad and a man who knows break clubs because he has had to pull on them.

Now if Mr. Jacobs' testimony were not correct they would have had a railroad man in here who used those clubs down in the freight yards to tell you that that was

a good and sufficient club. But where is one man produced by the defense who has to use those clubs down in a yard who has come in to testify that that would be a good usable club, and that its deficiency could not have been detected by someone experienced in the use of clubs? They can't produce one man or they would have had him here, believe me. But all that they can produce here is that they bought them on the market, paid a fair price for them and gave them a test which they didn't know was sufficient or not, and then send this man out to work with it.

Now there is another point involved here, and that is the question involved here, and that is the question of the efficiency of the brake, and the Court will—I don't know whether it will or not, so if the Court instructs you on the question of the sufficiency in the efficient operation of the [143] brakes—

Mr. Collins: Your Honor please, I will have to object to going into any question as to the sufficiency of the brake because that is not involved in this suit.

Mr. Brobst: The statement I am going to make is simply this, that if the Court instructs on that I want the jury to pay careful attention because the rules on efficient operation of a brake are entirely different from the rules that require you to prove ordinary care. But I don't think you even need to apply that stringent law here, when they admit on the witness stand that they didn't know how much strength that club was required to have to be safe to be operated by a man out in the field tightening brakes. It is just common sense. I was amazed that they offered such type of testimony as a defense.

Now I want to pass for a moment to the question of the injuries and the question of damages. The plaintiff in this case is not critically injured. He has a severe injury, I will say, an incapacitating injury. It isn't one where I would come in here and say that it is worth \$50,000 or \$60,000, or something like that—that is ridiculous—but I want you to look at the situation from this standpoint: This man is a working man. He earns his living by the use of his hands and by the use of a sound body. And when you think of the injury which he received, think of it in terms of the [144] work that he has to do. Relate his injury to his work. Sometimes a severe injury is not as damaging to one as a mild injury because a mild injury may prevent work.

I have in mind this example: You take this illustration (and I think it is a good one), take the Army flier, the Army ace. The slightest nose cold, which is to us something we can go about our ordinary affairs with, the nose cold will ground him. Sometimes they won't tell, but as soon as the medical department finds that the cold is present the man is grounded because it affects his ears and his equilibrium. That isn't very serious, yet it takes that man completely out of his field of work.

Now you take in this particular instance of Mr. Carson. He has to climb up and down on moving boxcars, he has to do heavy pulling on brake clubs, and so his back is injured so that he can't climb and he can't do that heavy pulling. Certainly he can walk around. He is ambulatory. It doesn't prevent him from carrying on those things. But it does prevent him from doing that heavy type of work.

Now let's trace his injury for a moment. He was up there pulling on that brake club and it broke, and

he swung around and hit the tank car. He went to the Southern Pacific doctor at Tucson, and the Southern Pacific doctor immediately began to give him heat treatments and diathermy. There was no response evidently to that type of treatment, so they took [145] his tonsils out. Why they took his tonsils out, I don't know. Mr. Carson didn't consent to it, but they evidently were not getting any results by the treatment that they were giving, although they had X-rayed him, so they took out his tonsils.

All right. Then after that months went by of treatment, and still no response, even though he had lost his tonsils. So they send him up to the General Hospital in San Francisco. They look at him and say, "Well, it is your teeth," and even though they took X-rays they pulled out three of his teeth. And what happens? Still no improvement.

So as a result of the accident he still has a sore back, he has lost his tonsils, he has lost three of his teeth, and now they come into court and say the proper treatment is to put a belt on him. How do we know whether the belt treatment is going to be any more satisfactory than the removal of the tonsils, the pulling of the teeth and the diathermy treatment? To none of those has there been a satisfactory response medically.

Now they come in and blame it onto something that he has had since birth. As you listen to these cases and the medical defense by the defense doctors you will find several defenses. Although a person works right up until the time of the accident, it is a most peculiar thing that when you have an accident and you can't go to work just at that same time your teeth become bad, your

tonsils become bad, you develop [146] arthritis and you have had that condition since birth. You will find those just routine in cases that you try. So now they are down to the last one, the only one they have left, which is that he had it from birth and that the only way to treat it is to wear a belt.

Well, I don't know. We had Dr. McReynolds on the stand. He did say that a degenerative process had taken place in there over a period of time and that he did have a weakened back. But he was able to work right up until the time he was hurt. And it aggravated it, and he felt that there was some nervous irritation there, and the reason he felt there was some nervous irritation there was because of atrophy in the left leg.

Dr. Sutherland did not deny the atrophy in the left leg. He was on the witness stand, and counsel went into it in detail with Dr. McReynolds, and he did not deny it by Dr. Sutherland, he didn't dare ask Dr. Sutherland because it was there and it was present and it was abnormal, showing a nerve injury.

I don't know what is wrong with this young man right now, and I think Dr. McReynolds gave a very honest opinion when he said he thought there was some nerve injury, that six and a half or seven months have gone by, with all the routine treatments and more, he has had his tonsils out, he has had his teeth out, he has had this diathermy and he has had all [147] of the recognized treatments, and yet he is not well. Now

they will say he has gone back to work. He has gone back to work and he has worked two or three days and then he has lost two or three days.

Now bear this in mind, please, that this man is not covered by workmen's compensation. This man has brought his suit under the Federal Employers' Liability Act, the only way he can get one nickel by reason of his injury, and the moment that he is unable to work by reason of this accident he is deprived of money to keep body and soul together.

So at the end of six months time without earnings, when it requires as much as it does to live in these times, what else can he do? Sure, these things are prolonged out like this in trial and other ways so that the man is forced to go to work.

As far as the amount of damages is concerned, he has lost six months time absolutely. I think it figures out approximately \$250 a month that he has lost. I think that figure is somewhere in the neighborhood of \$1500 actual loss of wages.

But I don't think that that amounts to a pittance compared to what his future might be. Granted he had a weak back, granted he had something the matter with him from birth, he was all right until that brake club broke. He was earning \$250 a month and when it broke now he can't go back. [148] Bear this in mind, that any job that this man undertakes, any company he goes to work for, he has to pass a physical examination, and

now he has a weak back. He has one that is injured. It is difficult for him to pass those physical examinations to continue on and compete in the labor market with those who are whole and not injured. And, as Dr. McReynolds says, the length of time it will need to repair that condition, he can't estimate it until he has been given this belt treatment, and neither the Southern Pacific doctor in the Tucson nor the Southern Pacific Hospital in San Francisco ever gave him any belt treatment. It is no fault of his own that he is where he is.

Now he is entitled, in addition to the compensation that he has lost, to the impairment in the earning capacity; he is entitled to the pain and suffering that he has undergone. Those are all elements and proper elements of damage. I don't know how much this case is worth, and I won't venture a guess. I will say this, that it isn't worth any \$25,000 or \$50,000, or anything in that category, but I do say that he is substantially damaged. I do say that he has a back that is going to bother him. I do say he is disabled so that he can only earn about one-half of what he has earned until his back gets back to where he can work, and when that will be I don't know, and Dr. McReynolds would not give you an opinion, and Dr. Sutherland says that he requires a belt. [149]

I think with all those facts before you that the plaintiff is entitled to a good and substantial verdict at your hands.

ARGUMENT IN BEHALF OF THE DEFENDANT

Mr. Collins: If your Honor please, ladies and gentlemen of the jury: The amazing thing about counsel's argument is that he speaks about taking examinations from other companies for the purpose of obtaining employment. It is my understanding that the gentleman is still employed by us and still expected to remain in our employment and we expect to keep him.

He spoke about his inability to work. Well, the plaintiff told you himself that he worked the last week preceding this trial. On the other hand, counsel says he can't do that heavy work such as going up and down cars when out of the lips of the witness himself he said, "I did go back to work and I worked continuously the last week."

Dr. McReynolds says he had a degenerative condition between the fifth lumbar and sacrum which is of long standing. He sat in the courtroom when Dr. Ross Sutherland said that it was a congenital anomaly before birth, and he didn't come back to the stand to deny it. All the X-rays were here. Yet counsel asks you to assess damages for a condition which the man was born with.

He said that Dr. McReynolds said there was an atrophy. He didn't say anything of the kind. He said there was a muscle [150] spasm when he moved, and he demonstrated it.

Counsel says that he was amazed that we didn't know the strength or the force which a man puts behind a brake club. No one can know that. How much force he can put on it and how much force you can is something else.

Let us commence this case and analyze it as to what the Southern Pacific Company did and what it didn't do, and then listen to the Court's instructions, particularly with reference to when we buy through a reputable firm. I think this company had a right to presume, even without inspection, that when they bought through a reputable firm that the firm would supply them a product which was fit for the purpose for which it was intended, and that in all probability that would have been sufficient inspection. You listen to what the Court says to you on that subject.

So we did buy from a standard, recognized, reputable firm supplying us with an instrumentality to be used by our employees. I think the Court will tell you about it, whether we had a right to rely upon it or not. I think we did. The Court will tell you whether we did or whether we didn't.

Even to the extent where we pay them more money than we had competitive bids for which were less because it was a better product.

In addition to that, the railroad company made a further inspection. They made an inspection of the club by examina- [151] tion which showed no defects. They then used an instrumentality in which they then made an additional inspection, placing pressure on it and if they found one club in the entire outfit that was bad, and they couldn't take each one of them and put it in the machine because that not only is unreasonable but it is impossible, you would break every club you had if you kept trying to find out where it was going to break. and if you pulled it to 500 or 600 pounds you would destroy the efficiency of the club because you would weaken it.

Then what was the next step? After they had been inspected and after we had purchased them from a reputable firm who represented to us that they were fit, and that is the presumption for the purpose for which they were manufactured, we still went to a greater length. We made our own inspection. We used an instrumentality taking one out of 20. You might say we could get one out of 10. But you take them as they are grouped, make your visual inspection and then we put them in the machine, which is standard all over the United States, as was testified to—

Mr. Brobst: I will object to that. That testimony was stricken out.

Mr. Collins: No, it wasn't.

Mr. Brobst: What others did by way of tests was.

Mr. Collins: He said it was standard. It was a voluntary statement and it was not stricken. [152]

The Court: You may proceed.

Mr. Collins: In other words, we have gone to a reputable firm, we have used standard tests for determining whether or not there was a defect. Now what are we charged with? We are charged that we did not use ordinary care in the selection of the instrumentality. There is no dispute but what we selected a reputable firm, an outstanding firm, according to the standards of the trade. There is no dispute that we went beyond that and didn't accept that as a finality, but we then took an instrumentality and performed our own test in addition to the right to rely upon a business firm selecting for us that which their product is supposed to be.

You gentlemen have been in business. You know how much you have a right to rely upon the products that

you buy, the products that you use in your business. Your automobile that you furnish your employees, do you go out and inspect every wheel and break every wheel to find out whether it is good or bad, or do you rely on General Motors or Chrysler to furnish you with a product which is fit for the purpose for which it was manufactured or intended to be used? That is what you do, or you wouldn't drive an automobile, or you wouldn't have a driver delivering groceries or hauling rock or hauling lumber. It would be impossible for you to function as a going business if you didn't rely upon those who furnished you with your instrumentalities, and you know it as well as I do. [153]

Now just how much ordinary care, additional care, do you use when you buy an instrumentality to use in your business or any other businessman? Do you go so far as to take one-fifth of the products furnished you and break them in half to see whether they are good? There isn't one lady or one gentleman in this jury box that ever saw or heard of any business breaking up the instrumentalities that they received when purchased in the regular course of business to see whether one in two or one in 500 is good or bad.

Now he speaks about inspection. The plaintiff in this case had a number of clubs to select. He said to you that he picked up this club and looked at it. There wasn't a thing on that club which would indicate to him, as an experienced trainman, that there was anything wrong with it, and therefore he used it.

Now when the plaintiff himself comes into court and tells you that he has selected a club which in his opinion, from the inspection, by visual inspection, the only instru-

ment that he had and the only way he had of knowing and the only way we had of knowing without breaking it in half, and if we broke every one in half we would have no brake clubs, he told you on the witness stand that the club was practically new, and the majority of those marks came on there from use of course.

Then counsel says to you that you must take that club back and break it in two to find out whether it is good so we [154] won't have any clubs to use. He is asking you to ask us to perform an impossibility. Our inspection showed it was good, the company that sold it to us said it was good, the plaintiff said it was good, and the man who was in the chemistry department said he could not tell, and no one could tell by looking at the club itself.

Then they brought in this man Jacobs, who is a representative of the Brotherhood, and counsel went on at great length here in telling you what a fine fellow he is. Sure he is a fine fellow for the use and benefit of the Brotherhood. I deal with them daily. I will put any one of them on the witness stand and ask him any question that will be beneficial by all odds to the injured man. I don't even need to discuss anything, and counsel didn't need to build up Mr. Jacobs. We know what his relationship is.

But that has nothing to do with the case. He picked it up. He didn't know what the weight of it was. He said, "It feels light to me." If he is an efficient yardman, as he claims he is, all he had to do was bring a scale and weigh it and tell you whether it was light or up to standard. Our boys told you it was up to standard.

So far as ordinary care is concerned, take yourself, any one of you, would you do any differently than we did

when we selected a manufacturer, a well-represented institution, an institution in which the entire trade believes in, to make a [155] product for you to run your business with, and after you have done that how much further would you go? Would you go as far as we did? Would you take the products that you had bought and purchased under the representation that they were good for the purpose for which they were furnished and break part of them to see whether they were good? You would not, and you wouldn't say to yourselves, I am guilty of negligence and I didn't use ordinary care in giving this man this brake club when, under his own testimony, he said the club looked good.

Would you or any one of you or any of your help that you are purchasing supplies for, wrenches, screwdrivers, break one in 20 to see whether the lot was good? You wouldn't go that far, and I know it, and you know it, ladies and gentlemen.

So on such testimony as this they ask you to return a verdict to buy a congenital anomaly from a man who has had it since birth and which their own witness, Dr. McReynolds, said there was a disintegration of the intervertebral disk and which had been going on for years and years. That is what he asks you to punish us for, punish us for using the best manufacturer in the country that we can get and use tests that we weren't required to use, and then say, here is a congenital anomaly, you ladies and gentlemen sell that to the Southern Pacific because he can't go up and down the cars when, under his own testimony, he says he went up and down the cars and [156] worked steadily during the past week, and that he had worked previously.

CLOSING ARGUMENT IN BEHALF OF
THE PLAINTIFF.

Mr. Brobst: If the Court please, ladies and gentlemen of the jury: I was making notes so hurriedly here that my reply may be somewhat disjointed, but I think it will be very short.

You know, it is a peculiar thing when counsel argues this way. He says that they buy from a reputable concern and then he goes right ahead and says that they subject their materials to a test. Well, if they are so sure and rely so much on the man they purchase from, why do they test the clubs? Why do they test them? Because they know they have defective ones in them and they wouldn't use them without testing them.

Then defense counsel aims his entire argument at new clubs. This boy was using a used club and Mr. Collins himself says the strain of 500 pounds would destroy the efficiency of the club. Well, how does the man know that that may not have been subjected to 650 pounds or any number of pounds of strain and its efficiency destroyed? They don't make any test to determine that. They put it right back in the can and tell the man he must use it or his brakes won't work. The argument just isn't sound.

Now he says that the man went back and worked. Certainly he went back and worked. I told you, how is he going to [157] live? His injury certainly isn't such that it is so terrible that he can't stand it. Certainly he works. But it is painful. But he has to work. There is no way for him to make a living otherwise. The Southern Pacific is certainly not giving him anything unless he goes out there and works for them. So he will

go out and work, and they will pay him, and then they come in and condemn him because he has the fortitude to do it.

What they try to do here is to shift the blame from their own shoulders onto some manufacturer, and they still didn't refute the argument as to the weight of the club.

When they had their expert on who tested these clubs, they didn't ask him if the weight of that club was all right, they simply asked him if it wasn't the standard club, and he just looked at it and said yes. He didn't pick it up to weigh it or anything else. It seems to me that this is just one of those cases which the defense likes to prolong in hopes that they can get a man back to work, just as has happened here, and then they can come in and argue down damages. That is the old process.

If you and I, as a practical matter, if we were outside of a court and gathered around in the living room of someone's home, and we said that a friend of ours was out working and they gave him a tool to work with and he went out and exerted ordinary strength on it that he normally uses to tie a brake [158] and the club broke, now just as among us, whose fault is it that this man was hurt? There wouldn't be one of you that wouldn't say that the company is at fault because the thing was weak and unsuitable for the purpose because it broke. And that is all there would be to the case. There wouldn't be all these technical objections. There wouldn't be all the chemists in here and the big machines involved. It would simply be a practical question and a thing, why certainly the company should pay the man. He is out there working for them, earning them their dividends,

but when he is hurt, Lord forbid that he should get anything.

Now there is no affirmative duty on these men to inspect these clubs. They have a right to rely upon the fact that the club that they are given is suitable for the purpose for which they are going to use it. If they were to test every one out there as they go to work they never would have time to get their work done. They have to pick up the tools that are furnished to them, give a look at them, and go out and do their work, whether or not that had been subjected to a 500-pound strain which would destroy its efficiency, that should be determined by an S. P. man, a supply man who took it in after it had been used and before he put it back in the can.

As to its weight, that was easily determined by the experienced man. You saw that right here in the courtroom. I don't know Jacobs from anyone. They tried to discredit him [159] because he is a union man, because he is one of the Brotherhood men. That is because they can't destroy his testimony by legitimate means on the witness stand. If they can inject a side issue to try to destroy his testimony, they will do it, but the right way, and the correct way, and the honest way is to do it by a witness on the witness stand.

Now as far as the injury is concerned, I have stayed strictly within the record, and when he says that Dr. McReynolds did not say that the left leg was smaller than the right, that is not true, because he said that there was seven-eighths of an inch less on the left than there was on the right—I believe it was two and some-odd centimeters—and counsel asked him what a centimeter was and to reduce it to inches, and then when he has the temerity to get up here and say that he never men-

tioned that, I can't understand it. So help me if I misquote any testimony, you correct me.

Now, ladies and gentlemen of the jury, you have heard the medical testimony. You have heard the evidence. Just remember this, that this is this man's day in court. What he gets from this jury is every red cent or nickel that he will get. This is all. It is in your hands. The book is closed when you bring in your verdict and when he walks out of this courtroom. That is all that can ever be done for this man as long as he lives as far as this accident is concerned. He gets not another cent from workmen's compensation or any other [160] source for his injury. This is all that he ever will get. I submit the case for your decision.

The Court: Ladies and gentlemen of the jury, as there have been a large number of proposed instructions by counsel for the plaintiff and defendant which is going to require the Court some time to investigate them before presenting to you the instructions of the Court. I will conclude that we will adjourn until tomorrow morning at 10:00 o'clock before the case will be finally submitted to you and the instructions given to you by the Court. So you will be excused until then. But during this adjournment you will remember the admonition of the Court; you are not to form or express an opinion or to allow anyone to speak to you about the case or read about it in the newspapers until it is finally submitted to you tomorrow morning. You are excused until tomorrow morning at 10:00 o'clock.

(Whereupon, at 11:45 o'clock a. m., an adjournment was taken until 10:00 o'clock a. m., August 29, 1947.) [161]

Los Angeles, California, August 29, 1947,
3:30 O'clock P. M.

(The following conference was held in chambers between Court and counsel outside the presence of the jury:)

Mr. Brobst: Judge, on all of these instructions dealing with this question, the thing that strikes me is that this club was not a new club, but it was a used club, and whatever condition it may have been in when they bought it new seems to me to become immaterial.

Mr. Collins: Everything that is used becomes second-hand the minute you use it.

Mr. Brobst: I don't think they have any right to rely on what the manufacturer might have done in view of the fact that it was a used club. We don't know what use it has been put to and there was no evidence of any tests. It would seem to me then the question of what has happened to a new club is immaterial and outside of the issues.

The Court: The condition in which the brake club was at the time it was used is an issue of fact. That is the province of the jury and it is not for the Court to draw a legal inference. I think that is an issue for the jury. I admitted testimony as to its condition, where they got it, who made it, and all those things. Those are all right, but it is for the jury to say whether or not at the time it was used it was in a safe condition under that statute. This is a pretty broad [162] statute. this new law. If you study it over it is a pretty broad statute.

Mr. Brobst: Another observation, in those cases, when I read them last night, they were things that were

given to the company, for instance, the switch stand, and then in the Elliott case—I forget what the particular device was—but it was delivered to the company and the company gave the tests that the manufacturer asked for and the equipment was found to be in first-class working condition, and then the Court held that it wasn't necessary for them to take the thing apart and look inside, that if they followed the instructions and gave the tests recommended and it worked perfectly, that that was not necessary. But I don't see how that can apply here. And also in those cases there was a guarantee that the product was fit for the purpose for which it was to be used.

Mr. Collins: No, no.

Mr. Brobst: I have read the cases and in each one there was a guarantee by the manufacturer.

The Court: This instruction requires me to pass on the weight to be given to that testimony, and, as a matter of fact, I don't think I have any authority to do that.

We can proceed along because I am satisfied that I should not give this last instruction. I will take up the requested instructions of the plaintiff first and then those of the [163] defendant.

These are not numbered, but I am taking them in the order in which you have them here.

“You are instructed that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and under all circumstances may be reasonable and proper. It is not necessary, therefore, that any of the witnesses should have expressed an opinion as to the

amount of such damages for pain and suffering, but the jury may make such estimate of the damages from the facts and circumstances and evidence by considering them in connection with their own knowledge and experience in the affairs of life.”

Any objection to that, counsel?

Mr. Collins: Mine are in a different order.

Mr. Brobst: You don't have any objection to the damage instruction, do you?

Mr. Collins: None whatever.

The Court: Let us take them up in order.

Mr. Collins: I have no objection to that instruction.

The Court: I will mark it given.

Now the next one:

“You are instructed that you are the exclusive [164] judges of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, against a lesser number. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a civil case.”

I have another instruction along that line. There is no use repeating it.

Mr. Collins: One is sufficient.

The Court: That will be covered in the general instructions.

Now the next one:

“If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries for

fixing such amounts. That plan or scheme is where each juror writes the amount to which he considers the plaintiff is entitled, and the amounts so written are added together, and the total is divided by 12. This is a scheme of chance and no element of chance may enter into your verdict or into the determination of any question necessary thereto." [165]

I also have an instruction on that. That will be given.

Mr. Collins: No objection.

The Court: Now the next one: You are instructed that a portion of the Federal Employers' Liability Act in effect at the time of this accident, reads as follows:

"Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.'"

Any objection to that? I will give that. That is the statute. I have checked the section.

Mr. Collins: I have no objection to that, as outlined in my statement. There isn't any roadbed involved.

The Court: It is just the language of the statute and I am instructing them more fully later on.

Mr. Brobst: The other sections are in there now, contributory negligence and assumption of risk.

Mr. Collins: And further that instruction should contain a provision, "unless you find that the plaintiff had contributory negligence." It has been held where you

take the statute [166] itself and give it without reference to the plea of contributory negligence that that is reversible error.

The Court: I give the statute later on about contributory negligence, that contributory negligence is no defense.

Mr. Brobst: It is hard to get it all in one instruction.

The Court: I am inclined to give that instruction on the statute.

Now the next one:

“While it is incumbent on plaintiff to prove his case by a preponderance of the evidence, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.”

Mr. Collins: No objection to that.

The Court: That will be given.

The next one:

“The defense of contributory negligence which is set out in the answer of the defendants is an affirmative defense, the burden of proving which is on the party alleging it, and until the contrary [167] appears, it is presumed that the plaintiff at the time and place of the accident in question, was not guilty of any negligence himself, but was exercising reasonable care for the protection of his own safety.”

I modified that by striking out, "but was exercising reasonable care for the protection of his own safety." I do not think that ought to be given.

Mr. Collins: I think it should read, "until the contrary appears from all the evidence."

The Court: "from all the evidence"; I will insert that in there. So it will now read: "* * * and until the contrary appears from all the evidence, it is presumed that the plaintiff * * *"

Any objection to that?

Mr. Collins: I think that should be crossed out.

The Court: "but was exercising reasonable care for the protection of his own safety?"

Mr. Collins: Yes.

The Court: It will be given as modified.

The next one:

"It is a presumption of law that all persons use ordinary care for the protection of their own safety. This presumption is in itself a species of proof to the benefit of which the plaintiff in this [168] action is entitled, unless and until it is overcome by contrary evidence."

Mr. Collins: I will object to that.

Mr. Brobst: I think that is improper. I will withdraw that.

The Court: I will mark it withdrawn.

Mr. Brobst: I think there is some serious question when the defendant himself has testified.

The Court: The next one:

"I charge those members of the jury who have had previous experience as trial jurors in negligence cases arising under State laws, to dispel from their

minds any and all conceptions that they may have with respect to the law of negligence as gained from the instructions of the Court in those cases, because in some respects and State and National laws conflict, and in actions under this Federal Employers' Liability Act, which proceed under National instead of State authority, you are bound to follow the instructions as now given to you by the Court which proceed upon National, as distinguished from State, authority."

Any objection?

Mr. Collins: I see nothing wrong with that instruction.

The Court: Very well. I will give that one. [169]

The next one:

"An employee has a right to assume that his employer has furnished him with safe appliances with which to work."

Any objection?

Mr. Collins: I think that should be "with reasonably safe appliances."

Mr. Brobst: I think the language is "safe appliances."

The Court: The authorities I have say "ordinary reasonable care."

Mr. Brobst: The appliance must be safe.

Mr. Collins: Certainly it would be safer to put the word "reasonable" in there.

The Court: "with reasonably safe appliances." I think that is fair. I think though they have the right to assume that they are furnishing safe appliances. I won't insert the word "reasonably." I think this is all right, counsel, "safe appliances."

Mr. Brobst: That is the statute.

The Court: Yes, that will be given.

Now the next one:

“Under the Federal statutes relating to the obligation of an interstate carrier to its employees, such a carrier has a duty to provide employees a reasonably safe place within which to work and [170] reasonably safe appliances and where the breach of that duty is the proximate or contributing cause of injury to an employee, the carrier is liable therefor and the defense of assumption of risk is unavailable.”

Mr. Collins: You see, in that instruction it is quoting from the statute and it uses “reasonably safe place.” In the preceding one you say it is not true, although quoting from the statute itself.

The Court: I think probably I had better put back “reasonably” in that previous instruction because there will be a conflict if I do not.

Mr. Collins: Then the further objection to the instruction that you have just read is that there is no issue involved about furnishing reasonably safe appliances.

Mr. Brobst: There is no question about that, but that we can modify by striking out the “reasonably safe place to work.” That leaves safe appliances again.

Mr. Collins: That is all right.

The Court: I will strike out the words “safe place within which to work and reasonably,” so that it will read, “such a carrier has a duty to provide employees a reasonably safe appliance and where the breach of that duty is the proximate or contributing cause of injury to an employee, the carrier is liable therefor and the

defense of assumption of risk is un- [171] available." That will strike out the "safe place within which to work."

Mr. Collins: That is all right.

The Court: That will be given as modified.

The next one:

"A railroad is charged with the duty of exercising reasonable care to furnish its employees with reasonably safe tools adapted to the purposes for which those tools are furnished."

The Court: That is just a repetition. It speaks of appliances and tools. I think it is a repetition.

Mr. Collins: There are three of them together.

Mr. Brobst: It is stated in different words. If you feel it is a repetition, why all right.

Mr. Collins: I think you would prefer to use the middle one on which we cut out about the safe place to work in.

Mr. Brobst: I think the first two would probably be all right.

The Court: Do you want to withdraw this one?

Mr. Brobst: Yes, I will withdraw it.

The Court: I will mark it withdrawn.

The next one:

"Plaintiff, at the time and place of the accident referred to in the complaint, being engaged in the conduct of interstate commerce, the statutes [172] of the State of California governing employers' liability and workmen's compensation are not applicable to this case, and plaintiff's right to recover, if any, is based on the statutes of the United States covering the liability of common carriers by railroads

to their employees for injuries sustained while in the course of their employment.”

Mr. Collins: There is no objection, but it has been given in exactly the same language in another instruction.

The Court: The one ahead of it?

Mr. Collins: Yes.

Mr. Brobst: If there is another one that repeats it, we will cut it out.

The Court: Yes, there is another one that covers it.

Mr. Brobst: One is to dispel from your minds, and this deals squarely with it.

Mr. Collins: You can't use both of them.

Mr. Brobst: One says the State laws and the first one doesn't mention compensation.

Mr. Collins: Yes, it does. I can write instructions and put them in a dozen different forms but that doesn't mean they are not repetitious.

The Court: I doubt if this is a repetition. I do not think it is. That will be given. [173]

Now the next one:

“If from the evidence in the case and under the instructions you find the issues for the plaintiff, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any; you may estimate such damages from the facts and circumstances and evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering the law prescribes no definite measure of damages, but leaves such damages to be fixed by you as your

discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint.”

Mr. Collins: I have no objection to that instruction whatever.

The Court: I will mark it given.

The next one:

“Although an employee is bound to exercise ordinary care in the use of tools furnished him by the employer, there is no affirmative duty of inspection required of the employee to discover de- [174] fects in appliances not so obvious that, with ordinary care in their proper use he would naturally discover the defects.”

Mr. Collins: I see nothing wrong with that.

The Court: That will be given.

The next one:

“Where plaintiff’s contributory negligence and defendant’s violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers’ Liability Act requires plaintiff’s contributory negligence, if any, to be disregarded.”

I suggest cutting out “disregarded” and adding, “and shall not bar a recovery but the damages, if any, shall be diminished.”

Mr. Collins: That instruction would be wrong because the Safety Appliance Act applies.

Mr. Brobst: Here is the problem there, Judge: Now we are coming to the Safety Appliance Act, and I might say a word on that.

I have put in, I think, about four instructions about the Safety Appliance Act which include hand brakes. The theory of putting them in was that these men testified that in order for those hand brakes to operate efficiently they had to use a brake club. It was brought out there that in the Tucson yards [175] these men use a brake club on that type of brake, and I feel that under that evidence, in order to make the brakes work efficiently, the requirement that they use a brake club makes the brake club a part of the brake, and therefore the Safety Appliance Act is applicable.

Now as far as the question of pleading that is concerned, it is not necessary to plead it, the authorities hold, where the facts show that the act is applicable.

Now in order to cure that I have prepared an instruction which I think should precede this.

The Court: Let us dispose of this one first.

Mr. Brobst: That will be correct, that the Safety Appliance Act applies, and I have prepared an instruction which makes it a question of fact for the jury as to whether or not that act applies, which I think should precede those instructions.

The Court: Precede this one?

Mr. Brobst: Yes, the two or three that I have inserted.

Now if the Safety Appliance Act does not apply, that will be error. If it does apply, it is a proper instruction.

Mr. Collins: The statute provides what shall constitute safe appliances and counsel is now attempting to say that because a brake club broke when winding up a brake that it then comes under the Safety Appliance Act, which of course is impossible. It never has applied. It isn't even mentioned [176] either in the statute or in the Interstate Commerce Commission in any of

their rules and regulations. A brake club is not any part of the equipment. If there ever would be a case of error, it would be to instruct under the Safety Appliance Act.

The Court: Is there any evidence as to that?

Mr. Brobst: Yes, the evidence is in that those brakes would not work efficiently without a brake club, and in the Tucson yards they are required to use a club to set those brakes. So if it is required to be used, it seems to me it becomes a part of the hand brake. They testified they couldn't set them without the hand brake, as a matter of fact.

The Court: Contributory negligence is only to be considered in figuring the damage.

Mr. Brobst: Under the Federal Employers' Liability Act, yes.

The Court: You cannot ignore that. You have to consider that.

Mr. Brobst: If it falls under the Safety Appliance Act then there is absolute liability. Reasonable care on the part of the defendant makes no difference, neither contributory negligence nor assumption of risk. The railroad then becomes an insurer. If they find that it was a necessary part to make the hand brake work efficiently, then they can apply the provisions of the Safety Appliance Act, but not otherwise. In other words, that would be a question for the jury to de- [177] termine, whether or not it is a part of the brake, and I think that is proper.

Mr. Collins: In other words, counsel wants you to lead the jury to say what is a safe appliance under the Safety Appliance Act, which they know nothing about. The statute has described what comes within the purview of that act, and counsel can't put that in.

Mr. Brobst: I can show you a case under the Boiler Inspection Act where it was left to the jury to determine the provisions of the boiler inspection applied to an engine which was going into a yard, that it was proper for them to do that. That is the same thing here, whether it comes under the provisions of the Safety Appliance Act or not.

Mr. Collins: I don't think so. In other words, the next thing you will be saying is that a lantern comes under the Safety Appliance Act.

Mr. Brobst: The evidence is that these brakes can't be set without the use of a brake club, that they could not be manipulated without a brake club.

Mr. Collins: Just remember this, Judge Cavanah, this plaintiff himself said —

The Court: I see here your written objections to these instructions. Counsel filed written objections. You have seen that?

Mr. Brobst: Yes. [178]

The Court: I will consider those as I go along too.

Mr. Collins: Just remember this, the plaintiff in this case testified that this brake was in good condition, in good shape, and that there was nothing wrong with it.

Mr. Brobst: That is not synonymous with efficient operation. Defect makes no difference.

Mr. Collins: It has nothing to do with the operation or the use of a brake club.

The Court: Where does your objection come in?

Mr. Collins: Mine are in the order in which I have the instructions.

Mr. Brobst: These written objections are addressed to this very subject that we are on now.

The Court: The first thing we have to do is pass on this instruction that you just handed me.

Mr. Brobst: The whole question is this, your Honor: What I want to do is submit the question to the jury by the instruction that you are reading, for them to determine whether the provisions of the Safety Appliance Act apply, as to whether this brake club was a part of the braking equipment so as to fall within that act. If they find that it was part of the braking equipment, then they are to apply the instructions before you, but not otherwise. I think it is perfectly proper to do it that way.

The Court: This part of the instruction is all [179] right when you apply the following instructions * * *

Mr. Collins: May I be heard on that question?

The Court: Yes.

Mr. Collins: If, as counsel contends, which I do not believe by the widest stretch of the imagination, that a brake club can be considered a part of the equipment, there has been no violation of the Safety Appliance Act for the reason that there is no evidence, considering the brake club as a part of the brake, which I am sure it is not, that it didn't work efficiently in slowing down this car was that it was coming to a gradual stop and didn't come into collision, the brakes did work effectively with the use of the club, then if, as counsel says, it is a part of the equipment then it did work efficiently because the plaintiff said it did, and there is no room for those instructions whatsoever.

The Court: The trouble is that a lot of these instructions are asking me to discuss the force and effect of certain evidence, and I am not going to do that.

Mr. Collins: I have given you my reasons why those instructions should not be given. Certainly it would be error if they were given.

I agree with counsel that if it shows that there is defective equipment, then the Safety Appliance Act comes

in whether it has been pleaded or not, but there is no showing that there has been any defective equipment. The [180] only charge in the complaint is that we gave him a brake club which was defective and we didn't furnish him with a safe brake club to use. How you can stretch to say that a brake club is part of the equipment of a brake, when under the safety appliance rules it expressly states what constitutes a brake. Counsel is familiar with the safety appliance rules, and I think he is just leading the Court into trouble.

If counsel can show me, either in the safety appliance rules as laid down by the Interstate Commerce Commission, or in the statute, where there is even a mention of a brake club then I will withdraw all objections. You can't inject the Safety Appliance Act just because you think it can be good for your case if you can get it in there.

The Court: If this instruction is not allowed all the others will go out too.

Mr. Brobst: That is correct.

The Court: You are charging that they didn't furnish a safe brake club?

Mr. Brobst: Yes, your Honor, but the law is to this effect, that if the evidence shows that the Safety Appliance Act is applicable, it need not be pleaded and you are entitled, that is, the employee is entitled, to the benefit of the act.

Mr. Collins: There is no question about that, but there is no evidence here of a violation of the Safety Appliance Act. [181]

The Court: You say it does apply. In what way?

Mr. Brobst: In this way: The testimony is this, that you could not set those brakes by hand in the Tucson yard, that to make them operate efficiently they had to

use a brake club, and that the company required that they use a brake club to make them operate efficiently. So I think under that evidence the jury has a right to find that the brake club was a necessary part of those hand brakes because they couldn't be operated and set without the club.

The Court: There is evidence of course that it is necessary to use this club in operating the brake.

Mr. Collins: Understand this, Judge Cavanah, there can be no violation of the Safety Appliance Act unless there is a violation of the specifications laid down by the Interstate Commerce Commission as to what constitutes what a safe appliance is. In other words, they tell you that the brakes shall be such a shape or such a length, the chain will be such a length, hand bars will be fastened in such and such a manner, and so on.

Mr. Brobst: No. If the brake kicks back without showing any evidence, that is evidence enough.

Mr. Collins: There is no evidence that it was deficient. If the club breaks and you charge specifically we gave him a club that was not safe, that is a different matter.

The Court: I think I should limit the principles [182] of law to your specific allegation of negligence under the statute.

Mr. Brobst: That is true, your Honor, except as I have said, that where the evidence shows that the Safety Appliance Act applies which includes efficient hand brakes, then we are entitled to the benefit of that act without pleading it.

The Court: There isn't any evidence here that the Safety Appliance Act applies.

Mr. Brobst: We have here a safety appliance, which is a hand brake, and if the jury would find the brake club is a part of it and it breaks, and he is injured, he is

entitled to recover without regard to reasonable care, contributory negligence, or anything else.

Mr. Collins: I think if the Court gives those instructions it would not only be error but so confusing to the jury that they wouldn't know what they were doing.

The Court: Do you have the Safety Appliance Act handy?

(The document referred to was passed to the Court.)

Mr. Collins: If counsel can show me anywhere in the statute that there is any reference made to clubs, as I said before, I will withdraw my objections completely.

The Court: That is what I am trying to find out here.

Mr. Collins: It isn't in there.

Mr. Brobst: It isn't in there, but the thing is to make it operate efficiently they had to use the brake club, and I think the jury has a right to find that it is a part [183] of the hand brake. As a matter of fact, they said that it wouldn't tie down by hand which in itself I think, even that bare statement, would make it an inefficient hand brake if it wouldn't tie down by hand.

Mr. Collins: That is just stretching your imagination all over the place.

The Court: You are asking me to discuss and give force and effect to a conclusion from the evidence. You are asking me to do that to the jury. You are pointing out a fact for me to instruct the jury on.

Mr. Brobst: If they find that it is part of the brake, then they apply the safety appliance sections.

Mr. Collins: I think, your Honor please, we don't have many rights under these statutes but I think this is one we do have. If you read this section again, Judge Cavanah, I believe you will find my contention is correct.

The Court: He is saying that this club from the evidence is part and is necessary to have to operate that hand brake. That is what he is contending.

Mr. Brobst: The evidence is uncontradicted on that point, that the brake wouldn't stop by hand and that they had to use a club.

Mr. Collins: I take the position that it is not a part of the hand brake. If it was, it would be carried with the brake itself. He has charged us in his complaint [184] with only one thing, giving him a club that broke. This lets the jury speculate as to what constitutes part of a hand brake without any evidence whatever to guide them.

Mr. Brobst: They have uncontradicted evidence that it was set by hand and that was the only way that it could be set. It was necessary to use a club, and the company required that they use a club. That isn't contradicted at all. Certainly to me it is a necessary part of the brake when it won't stop without the use of a club.

The Court: I will allow it.

Then what follows that is this instruction about:

"Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded."

What bothers me is whether you can disregard that. I think you have to consider the plaintiff's contributory negligence even in awarding the amount of damages.

Mr. Brobst: If you find a violation of the Safety Appliance Act then they are to disregard it.

The Court: That will be given.

We will take up counsel's objections as we go along, but they cover that all the way through. That is all [185] your objections cover then.

Mr. Brobst: The written objections cover that particular point, Judge.

The Court: I will just cross this one out and put another one in order.

"The Federal Safety Appliance Act imposes upon the railroad carrier an absolute duty to equip its cars with hand brakes and appliances prescribed in the act and to equip and maintain such hand brakes in an efficient condition; and the liability for failure to maintain efficient hand brakes is absolute, regardless of negligence on the part of the railroad company or contributory negligence on the part of the plaintiff."

That will be allowed.

The next one:

"The Safety Appliance Act provides that all cars shall be equipped with efficient hand brakes. To be efficient the hand brake must be capable of operation and kept in such condition that it shall at all times be operative, and therefore, the test of compliance with the requirement of the statute is primarily effectiveness in operation and the question is whether or not it was able to produce the expected result when properly applied and if it [186] was so effective then it would be deemed efficient."

Mr. Collins: That is repetition.

Mr. Brobst: I think that is probably repetition.

The Court: Do you want to withdraw it?

Mr. Brobst: I will withdraw it.

The Court: I will mark it withdrawn.

The next one:

“Under the law, the defendant was bound to furnish the plaintiff efficient hand brakes at the time in question and defendant was absolutely bound to keep and maintain the hand brakes in an efficient condition at all times so as not to expose the plaintiff to unnecessary peril in the conduct of his duties.”

Mr. Collins: That is repetition too.

Mr. Brobst: Yes. I will withdraw that.

The Court: I will mark it withdrawn.

Mr. Collins: The next one is repetition too.

The Court: “A portion of the Federal Safety Appliance Act in effect at the time of this accident relating to hand brakes on railroad cars provides as follows:

“‘It shall be unlawful for any common carrier subject to the provisions of this chapter to haul or permit to be hauled or used on its line any car subject to the pro- [187] visions of this chapter not equipped with efficient brakes.’”

Mr. Collins: That is merely stating it in another way.

The Court: That is giving the statute.

Mr. Collins: They both say the same thing.

The Court: It is the same thing.

Mr. Brobst: All right. I will withdraw it.

The Court: I will mark it withdrawn.

Mr. Brobst: Now these two will have to go forward with these because they have to do with the Federal Employers' Liability Act. One is contributory negligence

and one is on assumption of risk. So they would go ahead of these here. You can insert those here. Put them in front of this instruction.

The Court: These can go right in here.

Mr. Brobst: Then the instruction on damage can follow.

Mr. Collins: Don't you think damage should follow the instructions?

Mr. Brobst: I want to keep straight the Safety Appliance Act instructions.

The Court: That is all the instructions you want?

Mr. Brobst: Yes, your Honor.

The Court: Now we will take up the defendant's proposed instructions.

Mr. Collins: Mine are all numbered.

The Court: Your objections relate to the matter [188] we discussed?

Mr. Brobst: Yes, your Honor.

The Court: Now we are through with your objections and we will take up the defendant's instructions.

The first one reads:

"The Court instructs the jury to find the issues in favor of and return a verdict in favor of the defendant, the Southern Pacific Company."

That is refused.

The next one:

"In case the Court refuses to give the foregoing instruction, then and in that event only, defendant requests each of the following instructions."

That will have to be refused because you are asking generally to give consideration. That will be refused.

Your instruction No. 3:

“The instructions which I am about to read to you are the instructions of the Court and you are expected and required under the law to follow the same. It is your duty to consider, not one of these instructions, but all of them together, and to construe them together for the purpose of definitely ascertaining the law upon the questions now submitted to you. It is further the duty of the Court to instruct you upon all phases of the law [189] which apply to any fact or circumstances which is in evidence and upon which you may find, regardless of what the Court thinks the weight of evidence shows.

“You are the sole and exclusive judges of what the facts are. It is for you to judge of the credibility of the witnesses and to determine what the truth is. Having ascertained what the facts are, it is further your duty then to arrive at your verdict in accordance with that law and those facts, without passion or prejudice, or sympathy for either party.”

There is no objection to that, is there?

Mr. Brobst: No.

The Court: I can see no objection. It is covered in the general instructions.

Mr. Brobst: It is probably a general instruction.

The Court: I will look and see if there is any repetition. It will be given anyhow, you understand.

Mr. Collins: Yes.

The Court: No. 4:

“In this case the plaintiff claims to have sustained damages by reason of the negligence of the Southern Pacific Company, defendant. The burden is upon plaintiff to prove such negligence by a preponderance of the evidence, and to prove further that such negligence [190] upon the part of the Southern Pacific Company contributed directly and proximately to the damages sustained. On both these issues the burden is upon the plaintiff. Unless the plaintiff proves both the negligence of the Southern Pacific Company and that such negligence directly and/or proximately contributed to the damages sustained, there can be no recovery herein and your verdict must be against the plaintiff and in favor of the defendant.”

Mr. Collins: Any objection to No. 4, counsel?

Mr. Brobst: Yes. It is uncertain; the “and/or” makes it error.

Mr. Collins: I think the word “and” should be stricken.

The Court: That will be allowed.

No. 5: —

Mr. Collins: No. 5 is a repetition.

The Court: Do you want to withdraw that?

Mr. Collins: Yes.

The Court: No. 6:

“Before negligence can be held to be actionable it must be shown to be the direct and proximate cause of the injury complained of, that is to say, a causal connection must be shown to exist between

negligence and injury, and the negligence complained of must proceed in [191] an unbroken course to the very point of inflicting the injury. If the negligence claimed to be the cause of the injury is shown to have been interrupted by a separate, independent, intervening act of a third party, negligent or otherwise, then the chain of causation is broken, and the negligence complained of becomes a remote contingency which can no longer be considered the proximate cause of the injury."

Mr. Collins: Do you have any objection to No. 6, counsel?

The Court: When I read that through I couldn't see any objection to it.

Mr. Brobst: There is no evidence that any independent third party came into this at all. It is just bringing in an extraneous matter into the case.

Mr. Collins: All right. We will withdraw it.

The Court: I will mark it withdrawn.

Next one:

"You are instructed that the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation."

Mr. Brobst: No objection to that.

The Court: That will be given.

No. 8: [192]

"You are instructed that the mere happening of the accident raises no presumption whatever that the defendant was negligent, or that its negligence, if it were guilty of any negligence, was the proximate cause of said accident."

Mr. Brobst: That is all right.

The Court: That will be given.

No. 9:

“You are instructed that the defendant is not liable under any theory of this case unless you find that it was guilty of some negligence which was a proximate cause of the accident; otherwise you will return a verdict in favor of the defendant regardless of any and all other circumstances.”

Mr. Brobst: That is just another repetition of proximate cause.

Mr. Collins: I don't think so.

Mr. Brobst: That one instruction that says you can't recover unless it is the proximate cause, I think that is the law.

Mr. Collins: I think this is a different instruction.

Mr. Brobst: I think defendant's instruction No. 4 covers the whole thing.

The Court: That covers it, doesn't it? This is just repetition. Do you insist on No. 9? [193]

Mr. Collins: No, I guess not.

I have amended this instruction now so I think it will meet with your approval.

The Court: It is the same thing.

Mr. Collins: You have no objection to the form of that instruction, have you?

Mr. Brobst: It is almost a direction and I don't feel that it should be given.

Mr. Collins: Let's change it so it won't be a direction.

The Court: I do not think I should give it.

Mr. Collins: Probably not in that form, but I think you have to instruct on that question.

How does this sound to you?

“You are instructed that one who purchases an article from a manufacturer of recognized standing, then he has a right to assume that in the manufacture thereof proper care was taken and that proper tests were made, that when it was delivered it was in a fair and reasonable condition for use.”

Mr. Brobst: I think that is just language out of a case and it is not a summary of the law at all.

Mr. Collins: It is a statement of the law.

Mr. Brobst: But it is qualified by the Supreme Court.

Mr. Collins: Then I add to that:

“Unless there was some apparent, patent defect in the instrumentality which reasonable inspection would disclose.” [194]

Mr. Brobst: Even that doesn't cure it. That is a question for the jury. Even the Supreme Court qualifies that language.

Mr. Collins: You admitted evidence that we did buy it through a reputable firm. Now, then, if the law means anything and it says that if we do that we have a right to rely that it is going to be an instrumentality that is satisfactory, then the jury is entitled to know if there is such a law.

Mr. Brobst: This is a used club and not a new club.

Mr. Collins: They contemplate all clubs will be used and when you manufacture them you manufacture them with the idea that they will be used.

Mr. Brobst: I don't think it is right.

The Court: I cannot see it.

Mr. Collins: Certainly we are entitled to an instruction along that line.

The Court: I will have to deny this. This one you want to put in the regular instructions?

Mr. Collins: I am going to submit this corrected one tomorrow morning which I have just read to you.

The Court: This one is 9-A.

Mr. Collins: I will call it 9-B in submitting the amended instruction. [195]

The Court: No. 10:

“You are instructed that the mere fact that the defendant may have been negligent, if you find that the defendant was negligent, would not be sufficient to render it liable under any theory of this case. It would be necessary for the negligence, if any, on the part of the defendant, to have been a proximate cause of the injury. If it was not a proximate cause then the defendant would not be liable at all. What is meant by ‘proximate cause’ is stated to you in another instruction.”

Mr. Brobst: I think that is another one of those like No. 5 which covers the proximate cause.

The Court: I have instructed them on proximate cause five or six times already.

Mr. Brobst: I think that is right. That one instruction covers both proximate cause and negligence and I don't think it should be repeated.

The Court: Do you insist on this one? I think it is repetition.

Mr. Collins: All right.

The Court: It is withdrawn?

Mr. Collins: Yes.

The Court: Now the next one, No. 11:

"You are instructed that reasonable care in [196] the matter of inspection requires the defendant to make such examination and tests as a reasonably prudent man would deem necessary under the same or similar circumstances for the discovery of defects. The defendant is not required, unless put upon notice as to any probable existence of defects, to employ unusual or extraordinary tests, nor even to use the latest and most improved methods of testing its tools. If you believe from the evidence that the Southern Pacific Company used the same degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercised under like circumstances in the inspection of its tools, then, and in that event, I instruct you that the Southern Pacific Company is not guilty of any actionable negligence and your verdict should be for the defendant."

Mr. Brobst: That is wrong. I have no objection to it down to the word "tools," where it says, "even to use the latest and most improved methods of testing its tools," but I think the next paragraph that follows, beginning with "If you believe from the evidence that the Southern Pacific Company used the same degree of care," I know that is wrong.

Mr. Collins: These authorities that I have cited state that. [197]

The Court: I will allow it as modified by cutting out commencing with, "If you believe from the evidence," down to and ending with "your verdict should be for the defendant." Now down to that point I understand there is no objection?

Mr. Brobst: That is right.

The Court: The rest is objectionable?

Mr. Brobst: Yes.

The Court: It will be given as modified.

No. 12:

“You are instructed that the defendant, the Southern Pacific Company, is not liable for those risks which it could not avoid in the observance of its duty of due care. In applying the above principle in this case, while it is true that the plaintiff did not assume the risks of danger in his employment, nevertheless, he can only recover in this case by proving by a preponderance of the evidence that the defendant, the Southern Pacific Company, through its agents, servants, or employees, was guilty of negligence which, in whole or in part, proximately caused the accident and any injuries or damages resulting therefrom, and if you find from a preponderance of the evidence that the dangers, if any, to which the plaintiff was subjected, and which caused his injuries, if any, could not have been avoided by the defendant, the Southern Pacific Company, in the exercise of reasonable care, then the plaintiff is not entitled to recover against the defend- [198] ant, and you should return a verdict in favor of the defendant.”

Mr. Brobst: I think that is a compound and argumentative instruction.

Mr. Collins: It is out of the latest case.

Mr. Brobst: It is an argumentative instruction.

Mr. Collins: It is simply a plain statement of the law.

Mr. Brobst: But in this case they can bring in a verdict if they find it is a violation of the Safety Appliance Act.

Mr. Collins: I am perfectly willing to add, "unless you find that there was a violation of the Safety Appliance Act."

Mr. Brobst: This is one of those formal instructions. It directs a verdict. I think it is all covered in proximate cause.

Mr. Collins: I am perfectly willing that there be a period after "therefrom," if you want to modify it in that respect.

The Court: It would take away entirely the consideration whether this club was defective or not.

Mr. Brobst: That is the whole thing.

The Court: That is the statute and that is what is specifically alleged, not negligence of its agents. They are pleading specific negligence, which was the defectiveness of this club. [199]

Mr. Brobst: I think it is entirely wrong.

The Court: I will have to refuse it.

Mr. Collins: You mean to say that they can recover without respect to negligence?

Mr. Brobst: That is all covered in proximate cause.

The Court: This will be refused.

The next one, No. 13:

"You are instructed that the defendant is not an insurer of the safety of its employees, and that before the plaintiff can recover in this case, he must prove by a preponderance of the evidence that the defendant has been guilty of negligence that proximately contributed to his accident and any damages sustained by him."

Mr. Brobst: I have no objection if there is added, "is not an insurer of the safety of its employees unless you find from a preponderance of the evidence that the provisions of the Safety Appliance Act apply.

Mr. Collins: We are still not the insurer of the safety of the employees at any time. You know that.

Mr. Brobst: Then if you want to add at the end, "unless you find from a preponderance of the evidence that the provisions of the Safety Appliance Act apply."

Mr. Collins: No, even the Safety Appliance Act doesn't make up an insurer of their safety. [200]

Mr. Brobst: I say, add at the end, "unless you find."

Mr. Collins: Then we become an insurer, according to your theory, which isn't the law.

Make it read: "You are instructed that the defendant is not an insurer of the safety of its employees, period."

Mr. Brobst: That is all right, if you strike out the rest. I have no objection to it then.

Mr. Collins: All right. Make it "employees," period.

The Court: Then the rest goes out. It will be given as modified.

The next one, No. 14:

"You are instructed that defendant, the Southern Pacific Company, is only required to exercise ordinary care and diligence to use and adopt appliances or equipment in known practical use to secure the safety of its employees, and is not bound or required to use or adopt every new appliance or type of equipment which the highest scientific skill might suggest. It is complying with its full duty in this regard if it exercises ordinary care to adopt and use ordinary safe appliances or equipment in known use under similar circumstances."

Mr. Brobst: I don't know whether that meets the facts here or not.

Mr. Collins: That is a good instruction.

The Court: I do not see any objection to that. [201]

Mr. Brobst: I just don't think it applies.

The Court: There is some evidence here on that. They put a man on the stand with regard to that. It will be given.

No. 15:

"You are instructed that the term 'latent defect' means a defect that is not visible or apparent; a hidden defect; it applies to that which is present without manifesting itself; it cannot be discovered by mere observation."

Mr. Brobst: "or test."

Mr. Collins: You want to add something in there?

Mr. Brobst: Yes. That it can't be discovered by mere observation. I don't think that covers it completely.

Mr. Collins: I think it does. That is your absolute definition of a "latent defect." You can't change the entire dictionary or the decisions of the Supreme Court because it doesn't sound good.

Mr. Brobst: I think you are required to do more than that. You have to make observations.

The Court: You have to go further.

Mr. Collins: "or simple test," you want added in there?

Mr. Brobst: That isn't the law.

The Court: I can strike out, "it cannot be discovered by mere observation."

Mr. Brobst: It applies to that which is present with-
[202] out manifesting itself.

The Court: I think down to there is all right. The other, "it cannot be discovered by mere observation," that is argumentative. It will be allowed as modified and that portion will be stricken.

No. 16:

"The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he or she has failed to fulfill his or her burden of proof. To put the matter in another way, if after considering all of the evidence, you should find that it is just as probable that either the defendant was not negligent, or if it was, its negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established."

Mr. Collins: Do you have any objection to No. 16?

Mr. Brobst: Only this, this is under the State law and it doesn't include the Safety Appliance Act.

Mr. Collins: This is merely an instruction on our theory of the case. You have yours covered otherwise.

The Court: "If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not [203] preponderate in favor of the party making the charge, then he or she has failed to fulfill his or her burden of proof."

Mr. Brobst: I think to there it is a good instruction.

The Court: "To put the matter in another way," that is argument.

Mr. Brobst: I think so too. Down to the "burden of proof" is a good instruction.

The Court: If you put in this other, you are asking me to go into the evidence and argue. It will be allowed as modified by striking out commencing with "to put the matter in another way" down to the end of it. That is stricken out.

Now No. 17:

"You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote conjectural or speculative."

Mr. Brobst: There is nothing wrong with that.

The Court: That will be given then.

No. 18:

"Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix [204] a maximum limit, and you are not permitted to award plaintiff more than that amount."

Mr. Brobst: No. 18 is all right.

The Court: I can see no objection to that. It will be given.

The Court: No. 19:

"A witness false in one part of his or her testimony is to be distrusted in others. If, therefore, you believe that any witness has testified falsely in regard to any fact, not as the result of mistake or inadvertence, but wilfully and with a design to

deceive, you must treat all of his or her testimony with distrust and suspicion, and reject it all, unless you shall be convinced that notwithstanding the base character of the witness he or she has in other particulars stated the truth."

Mr. Brobst: That is all right.

The Court: The rule is a little broader than that. This is all right as far as it goes, but if he is corroborated by other evidence in the case they accept his testimony. Maybe a man has testified falsely but if he is corroborated by other evidence it is received. I think there should be added to it, "or has been corroborated by other evidence."

Mr. Collins: That is all right. I think that includes [205] it, but I have no objection.

The Court: I do not see where it applies.

Mr. Collins: I am perfectly willing to withdraw it.

The Court: All right. It will be withdrawn.

No. 20:

"You are instructed that you should not permit any sympathy for the plaintiff, or bias against the defendant, the Southern Pacific Company, to influence you in any manner in arriving at your verdict. Your verdict must be based solely on the evidence received and the law as given to you in these instructions, and not upon anything you may have otherwise heard or read. The parties to this litigation are entitled to your calm, dispassionate judgment, the same as if they were not corporations, or were individuals, no more and no less."

Mr. Brobst: No. 20 is all right.

The Court: I have it marked "given" unless you have some objection.

Mr. Brobst: I have no objection.

The Court: No. 21:

"In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it." Isn't that going pretty strong?

Mr. Brobst: That is in State courts, but it hasn't been used in the Federal Employers' Liability statute.

The Court: That is a little argumentative for me to put in. You ask me to put in a little argument now and then. I will allow it down to "proximately caused by negligence," and cut out that part, "even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it."

It will be allowed as modified.

No. 22:

"You are instructed that in civil cases, such as this is, a preponderance of the evidence is required in order for the plaintiff to be entitled to recover; i. e., such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests. The burden of proof rests upon the plaintiff to prove and establish all of the controverted material [207] allegations of his complaint by a pre-

ponderance of the evidence; and if you find that the plaintiff has not sustained this burden of proof or if you find that the evidence is evenly balanced or that it preponderates in favor of the defendant, the Southern Pacific Company, then the plaintiff cannot recover from the defendant, the Southern Pacific Company, and in such case your verdict will be in favor of the defendant.”

That latter part goes into argument again. I suggest up here on the second line, “a preponderance of the evidence, as I have said.” I am speaking of the preponderance of the evidence three or four times here. I will insert in there, “as I have said.” However, I don’t know.

Mr. Collins: Why not change line 14 and say, “or that it preponderates in favor of the defendant, the Southern Pacific Company, then the plaintiff has not sustained the burden of proof.” That gets your argument out of it.

Mr. Brobst: Of course this is repetition.

Mr. Collins: On line 14: “if you find that the evidence is evenly balanced or that it preponderates in favor of the defendant, the Southern Pacific Company, then the plaintiff has not sustained the burden of proof,” and cross out the rest of that which counsel says is argument.

Mr. Brobst: I think it simply repetition. It is not [208] nearly as clear an instruction as the others. I don’t know what that “i. e.” means.

Mr. Collins: Namely.

Mr. Brobst: Then you get into argument again.

The Court: I have given that three or four times.

Mr. Brobst: I think just the first sentence, your Honor, is a good instruction, but the rest of it is argument.

The Court: Yes, the rest is argument. I will modify it by striking out the rest and allow it down to, "when weighed with that opposed to it."

Now No. 23:

"You are instructed that you may not speculate as to whether the defendant, the Southern Pacific Company, was negligent with respect to any matters shown in connection with the alleged injury to plaintiff; but such negligence, if any, must be proved by the plaintiff by a preponderance of the evidence, and if the evidence leaves the real cause of the alleged injuries to plaintiff as a matter of conjecture or doubt, then your verdict shall be in favor of the defendant and against the plaintiff."

Mr. Brobst: I think that likewise is argument. It is also repetition, that he must prove his case by a preponderance of the evidence. [209]

The Court: You are asking them to speculate.

Mr. Brobst: The latest decisions, your Honor, in the Supreme Court have said that the jury can speculate and guess. That is an unusually liberal view, but in these cases, the latest cases, the Supreme Court of the United States has said that the jury has a right to speculate and that some conjecture and guess enters into all verdicts of the jury. That is the latest word by the United States Supreme Court.

As a matter of fact, I have that volume here, or I have a law review report on it, where it is set forth in an article. So I think that would be error. I think he has given instructions on preponderance of the evidence and proximate cause and burden of proof, and I think this goes beyond the latest opinions of the Supreme Court.

The Court: I think back here there was an instruction relating to that. I will insert in that the words "you cannot speculate." It is covered in a way that they cannot indulge in that. I think I will insert it over here, refusing this instruction, because I will cover it in another one. So I will refuse this one. There is another instruction over here where I can insert that.

Now the next one, No. 24:

"You are instructed that if you believe from the evidence that the brake club in question was purchased from a reputable manufacturer then the railroad com- [210] pany cannot be charged with negligence because of any structural or inherent defect which was not patent at the time the club was delivered to the plaintiff for his use."

That will be refused.

Mr. Collins: You say that will be refused?

The Court: Yes:

Mr. Collins: Mr. Reporter, will you take this instruction so it can be accepted or rejected:

"You are instructed that one who purchases an instrumentality from a manufacturer of recognized standing then he has the right to assume that in the manufacture thereof proper care was taken and proper tests were made and that when it was delivered it was in a fair and reasonable condition for use unless there was some apparent patent defect in the instrumentality which reasonable inspection or test would disclose."

The Court: That will be refused.

(Whereupon, at 5:30 o'clock p.m. the conference was adjourned.) [211]

Los Angeles, California; August 29, 1947;
10:00 o'clock A. M.

The Court: I ask you, ladies and gentlemen of the jury, to be patient for a while in presenting the instructions of the Court to you as there have been a large number of proposed instructions which the Court has had to consider.

INSTRUCTIONS TO THE JURY.

The Court: Ladies and gentlemen of the jury, the function you perform in a case of this kind, the duty you perform, is an important and necessary one. When you go to your jury room and come to consider your verdict, you will lay aside all suggestions which merely appeal to your feelings of prejudice, or your emotions, regardless of from which side they may have come in the case, and pass on it. Sometimes incidents inadvertently come into the trial of a case which really have no bearing upon it, and unless we are careful our judgment may be somewhat disturbed thereby. So that when you come to the real consideration of what your verdict should be careful to confine that consideration to the evidence, all of the circumstances in evidence, and only the fair and legitimate inference which may be drawn therefrom. After all, there is no reason for passion in the trial of this case. The issues are plain. It is a question as to whether or not the defendant was negligent and as to whether that negligence contributed to and was a proximate cause of the accident and [213] injury.

The complaint in this action is brought under the Federal Employers' Liability Act and it is not an action where workmen's compensation is awarded an employee merely because he was injured in the course of his em-

ployment. The statute under which the action is brought requires proof of negligence on the part of the employer which proximately contributed to the happening of the accident before any verdict in favor of the plaintiff can be rendered.

A portion of the Federal Employers' Liability Act in effect at the time of this accident, reads as follows:

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; or by reason of any defeat or inefficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

A portion of the act just mentioned to you in effect at the time of this accident, provides also as follows:

"In all actions hereafter brought against any such common carrier by railroad under or by [214] virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have

been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employée.”

I hereby instruct you that under the terms of the Federal Employers' Liability Act, if you find that the defendant was guilty of any negligence whatsoever as alleged in plaintiff's complaint, and further find that such negligence proximately contributed to plaintiff's being injured, then your verdict must be in favor of plaintiff and against defendant.

The proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred, but in order to warrant a finding that [215] the negligence is the proximate cause of an injury, it must happen from the evidence that the injury was the natural and probable consequence of the negligence and not to have been foreseen as likely to occur by a person of ordinary prudence in the light of the attending circumstances. There must be, as you see, therefore, a direct causal connection between the negligence of the defendant and the injury of the plaintiff. The negligence act of the defendant must be the proximate cause of the injury, that is, the real cause of the injury.

I will say to you further that with regard to pain and suffering the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and under all circumstances may be reasonable and proper. It is not necessary, therefore, that any of the witnesses should have expressed an opinion as to the amount of such damages

for pain and suffering, but the jury may make such estimate of the damages from the facts and circumstances and evidence by considering them in connection with their own knowledge and experience in the affairs of life.

I will say to you that you are the exclusive judges of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, against a lesser number. The direct evidence of one [216] witness who is entitled to full credit is sufficient for proof of any fact in a civil case.

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries for fixing such amount. That plan or scheme is where each juror writes the amount to which he considers the plaintiff is entitled, and the amounts so written are added together, and the total is divided by 12. This is a scheme of chance and no element of chance may enter into your verdict or into the determination of any question necessary thereto.

I will say to you further that another portion of the Federal Employers' Liability Act in effect at the time of this accident, reads as follows:

“Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars,

engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." [217]

While it is incumbent on plaintiff to prove his case by a preponderance of the evidence, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.

The defense of contributory negligence which is set out in the answer of the defendants is an affirmative defense, the burden of proving which is on the party alleging it, and until the contrary appears from all of the evidence, it is presumed that the plaintiff at the time and place of the accident in question, was not guilty of any negligence.

I charge you members of the jury who have had previous experience as trial jurors in negligence cases arising under state laws, to dispel from your minds any and all conceptions that you may have with respect to the law of negligence as gained from the instructions of the Court in those cases, because in some respects the state and national laws conflict, and in actions under this Federal Employers' Liability Act, which proceed under national instead of state authority, you are bound to follow the instructions as now given to you by the Court which proceed upon national, as distinguished from state, authority. [218]

I will say to you further that an employee has a right to assume that his employer has furnished him with reasonably safe appliances with which to work.

Further, under the Federal statutes relating to the obligation of an interstate carrier to its employees, such a carrier has a duty to provide employees reasonably safe appliances and where the breach of that duty is the proximate or contributing cause of injury to an employee, the carrier is liable therefor and the defense of assumption of risk is unavailable.

The plaintiff, at the time and place of the accident referred to in the complaint, being engaged in the conduct of interstate commerce, the statutes of the State of California governing employers' liability and workmen's compensation are not applicable to this case, and plaintiff's right to recover, if any, is based on the statutes of the United States covering the liability of common carriers by railroad to their employees for injuries sustained while in the course of their employment.

I will say to you further that if from the evidence in the case and under the instructions you find the issues for the plaintiff, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, [219] if any; you may estimate such damages from the facts and circumstances and evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering, the law prescribes no definite measure of damages, but leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint.

Although an employee is bound to exercise ordinary care in the use of tools furnished him by the employer, there is no affirmative duty of inspection required of the employes to discover defects in appliances not so obvious that, with ordinary care in their proper use he would naturally discover the defects.

Another provision of the Federal Employers' Liability Act, heretofore mentioned by the Court, in effect at the time of this accident, reads as follows:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in [220] proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

If you find that the plaintiff is entitled to recover you may award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of. And, in estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent and severity of his injury or injuries, if any, the extent, degree and character of

suffering, mental or physical, if any, its duration and its severity, and the loss of time and value thereof, and the loss of earning capacity.

You may also consider whether the injury was temporary in its nature, or is permanent in its character, and from all these elements you will resolve what sum will fairly compensate the plaintiff for the injury sustained.

If you find that the plaintiff is entitled to recover, the measure of his recovery is what is denominated compensatory damages, that is, such sum as will compensate him for [221] the injury he has sustained.

If you find from a preponderance of the evidence that the hand brake on the tank car in question would not operate efficiently without the use of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions which I will give you.

Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded.

The instructions which I am about to read to you are the instructions of the Court and you are expected and required under the law to follow the same. It is your duty to consider, not one of these instructions, but all of them together, and to construe them together for the purpose of definitely ascertaining the law upon the questions now submitted to you. It is further the duty of the Court to instruct you upon all phases of the

law which apply to any fact or circumstances which is in evidence and upon which you may find, regardless of what the Court thinks the weight of the evidence shows.

You are the sole and exclusive judges of what the facts are. It is for you to judge of the credibility of the wit- [222] nesses and to determine what the truth is. Having ascertained what the facts are, it is further your duty then to arrive at your verdict in accordance with that law and those facts, without passion, or prejudice, or speculation, or sympathy for either party.

In this case the plaintiff claims to have sustained damages by reason of the negligence of the Southern Pacific Company, defendant. The burden is upon the plaintiff to prove such negligence by a preponderance of the evidence, and to prove further that such negligence upon the part of the Southern Pacific Company contributed directly and proximately to the damages sustained. On both these issues the burden is upon the plaintiff. Unless the plaintiff proves both the negligence of the Southern Pacific Company and that such negligence directly or proximately contributed to the damages sustained, then there can be no recovery herein and your verdict must be against the plaintiff and in favor of the defendant.

You are instructed that the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation.

The mere happening of the accident raises no presumption whatever that the defendant was negligent, or that its negligence, if it were guilty of any negligence, was the proximate cause of the accident. [223]

You are further instructed that reasonable care in the matter of inspection requires the defendant to make such examinations and tests as a reasonably prudent

man would deem necessary under the same or similar circumstances for the discovery of defects. The defendant is not required, unless put upon notice as to any probable existence of defects, to employ unusual or extraordinary tests, nor even to use the latest and most improved methods of testing its tools.

I will say to you further that the defendant is not an insurer of the safety of its employees.

You are further instructed that one who purchases an instrumentality from a manufacturer, he is justified in assuming that in the manufacture proper care was taken, and that proper tests were made of the different parts of the instrumentality, and that as delivered to him it is in a fair and reasonable condition for use, but it is never the duty of a purchaser not to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested.

You are instructed that the defendant company is only required to exercise ordinary care and diligence to use and adopt appliances or equipment in known practical use to secure the safety of its employees, and is not bound or required to use or adopt every new appliance or type of equipment which the highest scientific skill might suggest. It [224] is complying with its full duty in this regard if it exercises ordinary care to adopt and use ordinarily safe appliances or equipment in known use under similar circumstances.

The term "latent defect" means a defect that is not visible or apparent; a hidden defect; it applies to that which is present without manifesting itself.

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate

cause, so that it does not preponderate in favor of the party making the charge, then he or she has failed to fulfill his or her burden of proof.

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.

Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount.

The parties to this litigation are entitled to your calm, dispassionate judgment, the same as if they were not [225] corporations, or were individuals, no more and no less.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence.

I will say to you the issues to be determined by you in this case are these:

First, was the defendant negligent? If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely, was that negligence a proximate cause of any injury to the plaintiff? If you answer that question in the negative, plaintiff is not entitled to recover, but if you find it in the affirmative, you must then find on a third question:

was the plaintiff negligent? If you find that he was not, after having found in plaintiff's favor on the other two issues, you must fix the amount of plaintiff's damages and return a verdict in his favor.

If you find that the plaintiff was negligent and that his negligence contributed proximately to the accident, you will first determine the amount of the damages sustained by him and then determine in what proportion, figured in percentages, did the negligence of the plaintiff contribute as a proximate cause of the accident. When you have determined [226] the percentage in which plaintiff's negligence contributed to cause the accident, you will then reduce the total damages previously found by you in such proportion as the percentage of plaintiff's negligence bears to the full amount of the damages previously found by you to have been sustained by him, and return your verdict for the difference.

I will say to you further, that if you believe from the evidence that the plaintiff in this case was negligent at the time and place here under consideration and for your determination and if such negligence on his part was the sole proximate cause of the injuries and damages, if any, sustained by plaintiff, then the plaintiff cannot recover and your verdict should be for the defendant.

At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the

presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions of the burden of proof. [227]

Now if you find in favor of the plaintiff, the next question for you to consider is the damages which you will award to the plaintiff. Here again there is no precise measure. The question of damages is necessarily committed to the good sense of the jury. You are to consider that question as you consider other questions, dispassionately and fairly, with the purpose in good faith to award to him such reasonable-damages as he has suffered, if any, all of course as a result of this alleged accident.

As I say, the burden of proof in this case, as in all civil cases, upon him who alleges the existence of a certain fact. So in this case the burden was upon the plaintiff to show to you, by a preponderance of the evidence, all of the elements of the claim to which I have drawn your attention.

As I have said to you, you are the sole judges of the facts and you must determine what the facts are from the evidence which has been introduced, and from the circumstances which have been detailed by the witnesses. That being your responsibility, it is also your right and duty to determine, to pass upon the credibility of witnesses and the weight to be given to their testimony. You will consider the interests which the witnesses, if any, have in the result of the trial, and all other facts and circumstances which in the common experiences of life you have learned bear upon human testimony and tend to make it truthful and reliable or, on the other [228] hand, tend to distort or color it.

You are instructed to follow the instructions of the Court as given. If I have referred to any fact in the case during the course of the trial, or in any of these instructions, that would indicate to you any opinion I may have of a fact, you will disregard that opinion or that impression and determine this case solely upon the facts as you find them from the evidence and the instructions and circumstances in evidence as they have been detailed to you by the witnesses.

All of you must concur in finding a verdict. A form of verdict has been prepared and will be handed to you. The bailiff will be sworn and you may retire with the bailiff.

(At this point the bailiff was duly sworn to take charge of the jury.)

The Court: You may retire with the bailiff.

(The jury retired from the courtroom or deliberations at 10:50 o'clock a. m.)

Mr. Collins: The defendant now takes exceptions to the instructions given by the Court which the defendant has heretofore excepted to in writing and presented to the Court, and also those instructions which the defendant discussed with the Court in chambers and excepted to and were taken down by the shorthand reporter.

May it also be stipulated, counsel, that the exceptions may go to all of those instructions which we discussed in [229] chambers?

The Court: That the Court ruled on?

Mr. Collins: Our objections and statements.

The Court: Which the Court refused and allowed?

Mr. Collins: That is right. I suppose the same may apply to the plaintiff equally.

Mr. Brobst: Plaintiff will take exception to the one instruction dealing with the question of supply of appliances by a reputable manufacturer; and all other objections that may have been made in chambers.

Mr. Collins: Just the same as mine?

Mr. Brobst: That is right.

The Court: The reporter took it all down.

Mr. Collins: Yes.

And may it also be stipulated that the verdict may be received in the absence of the Court and counsel?

Mr. Brobst: If that is satisfactory with the Court. I don't know what the rule is here. Do you require counsel to be present?

The Court: In civil cases they do not need to be, but in criminal cases they do.

Mr. Collins: May it be stipulated that the Court may receive the jury in court and further instruct them in the absence of counsel, either by reading those which have heretofore been given to the jury or any additional instructions [230] which the Court may deem necessary, provided that the court reporter takes down such instructions?

Mr. Brobst: I will stipulate to that.

Mr. Collins: And that either party may have 10 days stay of execution from and after the hearing and determination of any motion for a new trial?

Mr. Brobst: That is satisfactory.

Mr. Collins: It is further stipulated that in the event the jury has not returned a verdict by 10 minutes to 12:00, or any other time, that the bailiff may take them to lunch without the formality of bringing them into court and without the formality of any order of the Court, and any and all objections to the procedure is hereby waived by both parties?

Mr. Brobst: So stipulated.

Mr. Collins: May it be further stipulated that counsel for plaintiff objected to the instruction with reference to the right of the railroad company to rely on the product of the manufacturer on the ground that it wasn't appropriate and had no application under the facts in this case?

Mr. Brobst: That is right.

Mr. Collins: And that I made the objection to the instruction that it didn't state the law correctly and at that time stated what the law was.

I believe that is sufficient to cover both of us.

Mr. Brobst: I think so. [231]

Mr. Collins: Mr. Reporter, I just spoke to Judge Cavanah in the hall and he said that we both made proper objections to the instructions and that they are to relate back to the conference in chambers. [232]

Los Angeles, California; August 29, 1947;

3:00 o'clock P. M.

The Court: Mr. Foreman, have you reached a verdict?

The Foreman: We have.

The Court: The Clerk will read the verdict.

The Clerk: In the District Court of the United States, in and for the Southern District of California, Central Division.

William K. Carson, Plaintiff, v Southern Pacific Company, a Corporation, Defendant.

No. 6950-M, Civil; verdict of the jury.

We, the jury in the above-entitled case, find the issues in favor of the plaintiff, and assess his damages in the sum of eighty-five hundred dollars (\$8500).

Dated: Los Angeles, California, August 29, 1947.

Glen Moore, Foreman of the Jury.

So say you all, ladies and gentlemen of the jury? (Assent.)

The Court: The jury will be excused until further notice.

(Whereupon, at 3:05 o'clock p. m., court was adjourned.)

[Endorsed]: Filed Oct. 1, 1947. [233]

[Endorsed]: No. 11773. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. William K. Carson, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed October 29, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth *District*

No. 11773

WILLIAM K. CARSON,

Plaintiff,

v.

SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

DESIGNATION OF RECORD TO BE PRINTED
AND STATEMENT OF POINTS UPON
WHICH DEFENDANT INTENDS TO RELY
UPON APPEAL

DESIGNATION OF RECORD TO BE PRINTED

I.

The defendant requests the entire record be printed.

STATEMENT OF POINTS UPON WHICH THE
DEFENDANT INTENDS TO RELY UPON
APPEAL

I.

That the court committed prejudicial error in giving certain instructions to the jury requested by the plaintiff, duly objected to by the defendant.

II.

That the court committed prejudicial error in refusing to give certain instructions to the jury requested by the defendant.

III.

That the court committed prejudicial error in modifying and giving certain instructions to the jury requested by the defendant and duly objected to by the defendant.

IV.

That the court committed prejudicial error in giving certain instructions to the jury upon its own motion, duly objected to by the defendant.

V.

That the court committed prejudicial error by permitting the jury, by way of instructions, to speculate as to whether or not the Federal Safety Appliance Act applied, said instructions having been duly objected to by the defendant.

VI.

That the court committed prejudicial error by permitting the jury, by way of instructions, to speculate as to whether or not a brake club constituted a part of the braking mechanism of a car, when it was the duty of the court to decide that as a matter of law.

VII.

That the court committed prejudicial error in submitting to the jury, over the objection of the defendant, the inter-

pretation and application of the Federal Safety Appliance Act which was, under the undisputed evidence, a matter of law for the court and not an issue of fact for the jury.

VIII.

That the evidence is insufficient as a matter of law to support the verdict.

Dated this 28th day of October, 1947.

C. W. CORNELL

O. O. COLLINS

MALCOLM ARCHBALD

JOHN R. ALLPORT

By O. O. Collins

Attorneys for Defendant Southern Pacific
Company

Received copy of the within Designation of Record, etc. this 28th day of October, 1947. Hildebrand, Bills & McLeod, by John M. Ennes (ea), Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 29, 1947. Paul P. O'Brien, Clerk.

No. 11773

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

WILLIAM K. CARSON,

Appellee.

APPELLANT'S OPENING BRIEF.

C. W. CORNELL,

O. O. COLLINS,

JOHN R. ALLPORT,

670 Pacific Electric Building, Los Angeles 14,
Attorneys for Appellant, Southern Pacific Company.

FILE
FEB 19 1948



TOPICAL INDEX

	PAGE
Statement of jurisdiction.....	1
Statement of the case.....	1
The evidence	3
The basis of plaintiff's case.....	32
Specification of errors.....	33
Specification of Errors Nos. I and II. Safety Appliance Act does not apply. It was error to submit that issue to the jury	34
Specification of Error No. III. The court committed error in refusing to grant defendant's motion for new trial on grounds that the evidence, as a matter of law, was insuffi- cient to support the verdict.....	52
Conclusion	61
Appendix :	
United States Safety-Appliance Standards Order of Commis- sion of March 13, 1911.....App. p.	1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Atchison, Topeka & Santa Fe Railway Company v. William W. Scarlett, 300 U. S. 471, 81 L. Ed. 749.....	40, 41
Baltimore & Ohio Railroad Company v. Groeger, 266 U. S. 521, 69 L. Ed. 419.....	45
Baltimore & O. R. Co. v. Hooven, 297 Fed. 919.....	35
Bodinson Mfg. Co. v. California E. Com., 17 Cal. (2d) 321, 109 P. (2d) 935.....	36
Campbell v. City of Santa Monica, 51 Cal. App. (2d) 626, 125 P. (2d) 561.....	36
Cincinnati, N. O. & T. P. P. Co. v. Rankin, 241 U. S. 318, 60 L. Ed. 1022	39
Clarke v. Foster's Inc., 51 Cal. App. (2d) 411, 125 P. (2d) 60	36
Compton v. Southern Pacific Co., 70 Cal. App. (2d) 267, 161 P. (2d) 40.....	36
Ford v. New York, N. H. & H. R. Co., 54 F. (2d) 342.....	43
Harlan v. Wabash Ry. Co., 73 S. W. (2d) 749.....	35
Holtman v. Butterfield, 51 Cal. App. 89, 196 Pac. 85.....	36
Kaminski v. Chicago, M., St. P. & P. R. Co., 231 N. W. 189; cert. den. 282 U. S. 872, 75 L. Ed. 770.....	35
Lowden, et al. v. Hanson, 134 F. (2d) 348.....	57, 60
Napier et al. v. Atlantic Coast Line R. Co., 272 U. S. 605, 71 L. Ed. 432.....	48
New York C. & St. L. R. Co. v. Kelley, 70 F. (2d) 548.....	35
Noftz v. Baltimore & O. R. Co., 13 F. (2d) 389.....	36
People v. Kaufman, 49 Cal. App. 570, 193 Pac. 573.....	36
Sherry v. Baltimore & O. R. Co., 30 F. (2d) 487; cert. den. 280 U. S. 555, 74 L. Ed. 611.....	35
Whittman v. Steiger, 46 Cal. 256.....	36

STATUTES	PAGE
Boiler Inspection Act (45 U. S. C. A., Sec. 23).....	36
Boiler Inspection Act of February 17, 1911, Chap. 103, Sec. 2, 36 Stat. 913.....	43, 45
Code of Civil Procedure, Sec. 2102.....	35
Federal Employers' Liability Act (45 U. S. C., Sec. 51).....	1, 32
Safety Appliance Act of March 2, 1893, Chap. 196, Sec. 4, 27 Stat. 531 (45 U. S. C. A., Sec. 4).....	43
United States Code, Title 28, Sec. 225(a).....	1
United States Code, Title 45, Sec. 11.....	34, 35, 37
United States Code, Title 45, Sec. 12.....	34, 37
United States Code, Title 45, Sec. 56.....	1

TEXTBOOKS

2 Roberts, Federal Liabilities of Carriers, pp. 2010-2013.....	39
2 Roberts, Federal Liabilities of Carriers, Sec. 562.....	39





No. 11773

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

WILLIAM K. CARSON,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

This is an appeal from a judgment of the United States District Court, Southern District of California, Central Division, entered on a verdict of a jury in an action founded upon the Federal Employers' Liability Act (United States Code Title 45, Section 51, *et seq.*). Jurisdiction of the District Court rested upon United States Code Title 45, Section 56, and the jurisdiction of this Court upon appeal is conferred by United States Code Title 28, Section 225 (a).

Statement of the Case.

This action was brought under the provisions of the Federal Employers' Liability Act, United States Code Title 45, Section 51, *et seq.* The plaintiff William K. Carson was employed by the defendant as a switchman in its yards in the City of Tucson, State of Arizona.

On February 2, 1947, at or about the hour of 10:30 in the morning the plaintiff was setting or "tying down" a hand brake on a tank car by inserting his brake club between the spokes of the wheel. When the plaintiff exerted force on the club it broke in two causing plaintiff to strike his back against the tank car.

The complaint charged that it was the duty of the defendant to exercise ordinary care to provide the plaintiff with reasonably safe equipment with which to work, and that the defendant negligently and carelessly furnished the plaintiff with a defective brake club in that the same was caused to be weak and not strong enough to stand up under ordinary work done by the plaintiff. [Tr. p. 3.] The defendant, by its answer, admitted that it was its duty to furnish the plaintiff with reasonably safe equipment with which to perform his work, but denied that it had carelessly or negligently furnished the plaintiff with a defective brake club, and further denied that by reason of any act or acts, faulty omission or omissions on the part of the defendant, its agents, servants or employees, that plaintiff was injured or damaged. [Tr. p. 7.]

A second and distinct answer and defense alleged that the plaintiff was guilty of negligence and that his negligence contributed to the accident.

A third and distinct answer and defense alleged that the plaintiff assumed the hazards incident to his employment and that the injuries or damages, if any, sustained by plaintiff arose solely from the hazards which were ordinarily incident to the performance of his duties, and not the result of any negligence on the part of the defendant, or its employees.

A fourth and distinct answer and defense alleged that it furnished the plaintiff, for use in the performance of

his duties, a hardwood brake club of standard make and design, of a type in general use for the purpose intended, and manufactured by a reputable firm, and that there was nothing about said club to indicate that it was in any way defective, and that the defects, if any, in said club were latent and unknown to the defendant and could not have been discovered by the defendant by the use of ordinary care.

The jury returned a verdict for the plaintiff in the sum of \$8,500.00, upon which judgment was entered together with the sum of \$76.40 costs, making a total of \$8,576.40. Motion for a new trial was presented in due time and denied by the Court. [Tr. p. 33.]

The Evidence.

The evidence in this case is not voluminous. For the convenience of the Court we will here quote that portion which we believe to be essential to the determination of the issues involved.

The plaintiff, testified on direct examination that he was employed by the Southern Pacific Company as a yardman on February 2, 1947, and switching a cut of cars. [Tr. p. 41.] That it was his duty to wind up or set the brake on the car he was riding; that the car was equipped with a staff brake. [Tr. p. 42.]

“Q. On this particular car, what type of a brake was it? A. Staff brake.

Q. Is that what is called a hand brake? A. That is a hand brake but you are required to use a club.

Q. It is a hand brake but you have to use a club?
A. Yes, sir.

Q. Now did you have a club with you that you were tying this car down with? A. Yes, sir.

Q. Where had you gotten that club? (10) A. From the front of the yard office. They have a can in front of the yard office and I got it out of there.

Q. When had you gotten the club? A. I got it that morning, 7:59, before I went to work.

Q. Is that something that is necessary to have with you? A. Yes, sir.

Q. Why? A. That is a hill yard and you need a club to tie the brakes down." [Tr. pp. 42 and 43.]

* * * * *

"Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.

Mr. Collins: Just a moment. I would like to ask a question on *voir dire*.

The Court: You may do so.

Voir Dire Examination

By Mr. Collins:

Q. That was on different cars, not this particular car? A. What is that?

The Court: He asked you what experience you have had in the past. Was it on different cars than this one that you (13) had that day?

The Witness: Yes. That is the first time I drove that car.

Mr. Collins: Objected to as incompetent, irrelevant and immaterial.

The Court: Did the cars you used on previous occasions, were they larger cars than the one on this occasion?

The Witness: Yes, sir.

The Court: Overruled.

Direct Examination (Continued)

Mr. Brobst: Will you read the question, Mr. Reporter?

(The question referred to was read by the reporter as follows):

(‘Q. In your past experience, state whether or not it was necessary to use a brake club to hold the cars.’)

The Witness: On some cars where they have a staff brake we have to use a brake club to hold the cars on the track.” [Tr. pp. 44 and 45.]

* * * * *

“Q. Now as you attempted to tie down this car at this particular time, just tell what happened. A. I was tying the brake down and the brake club broke and threw me against the end of the tank.

Q. Where did you say you got the brake club?

A. From the front of the yard office, the brake club can.

Q. Just describe the brake club if you will, please.

A. It is a piece of wood made out of hickory, about 32 inches long, and it is round at one end and it is tapered down at the other end.” [Tr. p. 47.]

The brake club was thereupon received in evidence as Plaintiff’s Exhibit No. 1. [Tr. p. 48.]

On cross examination the following facts were listed from Mr. Carson:

“Q. Every yardman is furnished with a brake club? A. Yes, sir.

Q. Do you know whether or not brakemen on the road trains, the main lines, are furnished with brake clubs? A. Yes, sir.

Q. In other words, that is the equipment which is furnished every yardman and every brakeman when he gets to work in that capacity? (27) A. Yes, sir.

Q. Now on the morning when you picked up this club—withdraw that.

These brake clubs then are handed out from time to time as the yardmen ask for them, is that correct? A. Well, yes, sir.

Q. In other words, when you go to work there is a big tub or barrel or something in which there are a number of brake clubs? A. Yes, sir.

Q. And you select a brake club from the number that may be there, is that correct? A. Yes, sir.

Q. And in the event a brake club is in there which in your opinion has been used a sufficient length of time you have a right to take another one, do you not? A. Yes, sir.

Q. And any brake club that appears to you to be defective, you can take it or you can reject it? A. Yes, sir.

Q. And they will give you a new brake club? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. About what is the life of a brake club, do you know, (28) approximately? How long are they used? A. I don't know.

Q. You use them then as long as in your opinion the brake club is usable and good for the purpose for which it is supplied to you, is that correct? A. Yes, sir.

Q. These black marks that we see on the outside and the grooves, that is where you put it into the brake wheel and the dirt rubs on the brake club, is that correct? A. Yes, sir.

Q. That in no way affects the usefulness of the club or its durability? A. No, sir.

Q. So on the morning when you selected this brake club you saw one which appeared to you to be practically new? A. Yes, sir.

Q. And you examined it to see whether or not it was usable, is that correct? A. I looked at it to see if there was any splits in it.

Q. Did you or did you not examine it to see whether or not the brake club appeared to be safe to use? A. Yes, sir.

Q. When you examined the club you found no flaws or defects which were visible, did you? A. No, sir. (29)

Q. It looked like a practically brand-new brake club, in perfect condition, didn't it? A. Yes, sir.

Q. No examination so far as your eyes were concerned revealed to you, nor with the exception of the brake (*sic*) which appears now—speaking about this crack—that there was any defect whatsoever in the manufacture or construction of the club? A. Not that I could see.

Q. Then you took the club and went to work and used it that morning, or was it in the evening? A. It was morning.

Q. How long did you see it before the accident happened? In other words, approximately how many hours? A. We had been working pretty steady.

Q. About how many hours? A. About two hours.

Q. You would say that you had tied down—when we say “tied down,” so that the jury will understand, we mean setting the brakes. A. Yes, sir.

Q. There is only one brake on one end of the car? A. Yes, sir.

Q. And that is called the B end of the car, is that correct? (30) A. Yes, sir.

Q. And each time that you set the brake this club gave no indication whatsoever to you that it was going to break, did it? A. No, sir.

Q. Now how many would you say you had tied down since you took this club in the morning, probably 15 or 20 cars? A. I tied down more than that.

Q. About how many would you say in the time that you were working that morning—that is February 3rd, was it not? A. February 2nd.

Q. That you tied down before this occurrence took place? A. (Pause.)

Q. Just your estimate, please, Mr. Carson. A. About 30 or 35 cars.

Q. You would say then, would you not, when you got this club that there were few marks on it, if at all, and these 30 or 35 cars you tied down did not of that marking on this club, isn't that correct? A. Yes, sir.

Q. And during the time that you were tying down the 30 or 35 cars there was no indication, such as a springing in the club or a cracking of the club, to indicate that there was anything wrong? (31) A. No cracking but it felt a little springy.

Q. What? A. It felt a little springy.

Q. There is a spring, of course, in every club as you use it? A. Yes, sir.

Q. In other words, it was just the normal club that you picked up from time to time and used in tying down cars other than the fact that it did break at the time that you fell? A. Yes, sir. [Tr. pp. 55-59 inclusive.]

“Q. And it was your duty to ride this cut to a standstill and set up the brakes, is that correct?

A. Yes, sir.

Q. Then when this cut of cars—was it two or three? A. It was three cars. (33)

Q. That is, a boxcar and two tankers? A. Yes, sir.

Q. When the engineer made the cut, or I should say stopped it and let these cars, roll, would you say they were rolling some four or five miles an hour?

A. Yes, sir.

Q. This cut of three cars was then going to go to a joint, to some other cars on the same track which were spotted? A. Yes, sir.

Q. During the process of making up a train to go out on the road? A. Yes, sir.

Q. Is that correct? A. Yes, sir.” [Tr. p. 60.]

* * * * *

“Q. Then the cut was made when the car which was going to a joint on making up the train was somewhere around 210 feet or 200 feet? A. Yes, sir.

Q. And moving about five miles per hour? A. Yes, sir.

Q. You started to set up the brakes, is that right? A. I started to set up the brakes when I got clear of the track.

Q. When you got clear of what? A. When it was clear of the main line.

Q. You mean after you cleared the switch point? A. Yes, sir.

Q. And you were standing there and you used your hands to take up the slack, is that correct? A. Yes, sir.

Q. Now so that the jury will understand what we mean by taking up the slack, down at the base of your staff there is a chain which fastens to a pin, is that correct? A. Yes, sir.

Q. And when you set up your brakes you take up the slack by winding up the loose chain? (35)
A. Yes, sir.

Q. There is a certain amount of loose chain on every brake which has to be there for a normal brake is that correct? A. Yes, sir.

Q. After you have taken up the slack, in other words, taken up all chain, and wrapped it around your staff then you use your club to set it up tightly, is that correct? A. Yes, sir.

Q. That is a normal, everyday operation indulged in every day by you yardmen, is that correct?
A. Yes, sir.

Q. Then when you put your club into the wheel, the spokes in there, you stick this club in between the spokes, is that correct? A. Yes, sir.

Q. And you gave one pull, is that correct, or had you taken several pulls with the brake? A. No, I took one pull.

Q. You took one pull? A. Yes.

Q. Did you find the slack pretty well set up at the time you started to pull it? A. Yes, sir.

Q. In other words, the brake slack on that car was (36) just about the normal range of slack that you should find in cars which are in good condition, isn't that right, because you only had to give it one pull? A. Yes, sir.

Q. The ratchet on that brake was in good shape?
A. Yes, sir.

Q. The dog was in good shape? A. Yes, sir.

Q. There wasn't anything the matter with the brake at all? A. No, sir.

Q. It was a perfectly normal operating brake without any defects whatsoever, wasn't it? A. Yes, sir.

Q. You say there were not any defects? A. No.

Q. The sole complaint you have in connection with this accident is that a brake club which you yourself inspected before going to work, for some unknown reason broke, is that right. A. Yes, sir.

Q. Of course in setting up a brake you don't measure the exertion or the effort that you put into the pull on a brake club, you give it whatever you think is necessary for the purpose of stopping this car within the distance in which (37) you have so that you will make a normal, easy joint or coupling, as we sometimes call it? A. Yes, sir.

Q. And whatever that, in your opinion, is necessary, whatever effort is necessary to exert, that is the effort that you use, is that right? A. Yes, sir." [Tr. pp. 61-63, inclusive.]

DANIEL J. BYRNE, JR., a witness called by the plaintiff, testified on direct examination that he was a switchman employed in the same crew with the plaintiff; that he did not witness the accident, but went over afterwards; that brake clubs were used by the Southern Pacific Company for use in setting brakes. [Tr. pp. 71 and 72.]

He described the operation of setting the brakes as follows:

"Redirect Examination

By Mr. Brobst:

Q. Maybe we can describe it a little better. There is a staff like this (illustrating) on the car, like I have this (50) pencil, is that correct? A. Yes, sir.

Q. Then on top of the staff there is a wheel?

A. That is right.

Q. And the wheel has spokes in it? A. Yes, sir.

Q. When you wind on the wheel on top of the shaft that brings up a chain that tightens up the brake shoes on the car? A. That is correct.

Q. And to get leverage you insert the club in the spokes of the wheel and then you can pull around that way and get more leverage, is that correct?

A. That is right.

Q. Or you shove on it, whichever way you do, is that correct? A. That is right.

Q. And that is what is known as the Ajax hand brake. A. Well, it is known as a staff hand brake."

[Tr. p. 73.]

VALNEY BARNETT, witness produced by the plaintiff, testified on direct examination that he was employed as a switchman by the Southern Pacific Company, and was foreman of plaintiff's crew; that he saw Mr. Carson fall against the end of the car; that he did not know what happened. [Tr. pp. 75 and 76.] He further testified:

"Q. About how fast was the cut of cars moving that Mr. Carson was on at the time that he lunged against the end of it? A. Well, they were practically to a stop.

Q. Now what type of brake was on this—you went over to the oil car, did you, or the tank car?

A. That is true.

Q. What type of brake did it have on it? (53)

A. Staff brake.

Q. Is that a hand operated brake? A. Well, they are commonly called hand brakes.

Q. Can you set them properly by hand? A. Not in the Tucson yard.

Q. What are you required to use to set them?
A. A club." [Tr. p. 75.]

WILSON D. JACOBS, witness for the plaintiff, testified on direct examination that he had been employed as a yardman by the Southern Pacific Company from 1921 to 1936. [Tr. p. 77.]

"Q. Have you used brake clubs? A. Oh, yes. I have rolled cars in the Los Angeles yard for the Southern Pacific for approximately 10 years out of my service here.

Q. During all of that time have you had occasion to use brake clubs? A. Most of the time; yes, sir.

Q. Now I will show you this brake club—

Mr. Collins: May I ask a question, counsel?

Mr. Brobst: Yes, sir. (57)

Mr. Collins: Your last service as a yardman was when?

The Witness: My last service working in the yard was November 1939, as I remember it.

Mr. Collins: Almost eight years ago?

The Witness: Yes, but I have been representing the yardmen on the Los Angeles Division since 1936, and I go into the yard daily.

By Mr. Brobst:

Q. Now, Mr. Jacobs, do you recognize this as being a type of brake club that is used by the Southern Pacific? A. Yes, sir.

Q. Would you just state, is that brake club that you have there a normal brake club?

Mr. Collins: That is objected to on the ground there is no foundation laid as to what is a normal brake club, whether he knows what the specifications are for a normal brake club.

The Court: Sustained.

By Mr. Brobst:

Q. Is that the type of brake club that was in use while you were working for the Southern Pacific Company? A. Yes, sir. This type of club has been used on the Los Angeles Division of the Southern Pacific for a good many years. I couldn't say exactly how long, but approximately 15 or 18 years. Before that they had a little different type than this. (58)

Q. And you are thoroughly familiar with that type of club? A. Yes, sir. I have rode many a cab with this type of a club.

Q. And the clubs that you used were supplied to you by the Southern Pacific Company? A. That is right.

Q. I will ask you now, in your opinion, is that a good strong club sufficient to be used in breaking cars? A. No, sir.

Q. Why not?" [Tr. pp. 78 and 79.]

Mr. Jacobs testified on *Voir Dire* Examination:

"By Mr. Collins:

Q. What experience have you had in the manufacture of brake clubs? A. I never had any.

Q. What experience have you had in the tensile strength of wood? A. I have represented—

Q. No, I didn't ask you who you represented, I asked you a simple question.

The Court: Let him complete his answer.

The Witness: I have represented a great many yardmen that have been involved in accidents on account of cars not being controlled that were under their charge and the specifications of brake clubs have been explained a great many times by the officers of the Southern Pacific Company that purchase them and supply them to the yardmen. That is what gives me the information that I have, on account of the information that I have heard the officers state at investigations.

Q. When you say "officers" you mean trainmasters and roadmasters? A. And men in the car department and also in the store department.

Q. So far as you are concerned personally, you have conducted no tests, is that right? (60) A. Only in applying brakes.

Q. I am speaking now about testing woods. A. I have assisted in testing brakes where there was an argument as to it.

Q. Would you please answer my question?

The Court: Let him complete his answer. You cut him off too quickly. Go ahead.

The Witness: Let me have the question.

(The question referred to was read by the reporter as follows:

('Q. So far as you are concerned personally, you have conducted no tests, is that right? A. Only in applying brakes.

('Q. I am speaking now about testing woods.')

The Witness: Well, I have assisted in making tests on brakes with brake clubs where brake clubs were used and where there had been an accident in connection with investigation that was being conducted.

M. Collins: I move that the answer be stricken as not responsive. I asked him what experience he had had in testing the tensile quality of woods.

Mr. Brobst: I will oppose the objection, your Honor.

The Court: He confines his questions to woods. That is what he is objecting to. This witness hasn't testified as to what kind of woods he has had experience with. (61)

Mr. Brobst: This witness refers to his testing of brake clubs when they have broken and accidents have arisen. I think that is proper.

The Court: Overruled. Go ahead.

By Mr. Collins:

Q. Do you know what the tensile strength of oak is? A. No, I don't.

Q. Do you know whether or not in the selection of wood for a brake club what examination or what is to be taken into consideration with reference as to how fast it grew or how slow it grew? A. All I know is what I have heard the officers say.

Q. I am speaking now, Mr. Witness, from your own experience. A. I never raised any timber.

Q. You don't know anything about how many rings are required or whether any are required or what the growth is? A. Yes. The growth is supposed to be second growth hickory.

Q. I am speaking about whether it should be fast or slow. A. I don't know whether they grow it fast or slow.

Q. Do you know second growth hickory when you see it? A. I am told these brake clubs are supposed to be second growth hickory. (62)

Q. I asked you, can you pick up a piece of wood and tell whether it is first or second growth? A. I am not a wood specialist, only brake clubs.

Mr. Collins: I object on the ground it is calling for a conclusion of the witness, no proper foundation laid whether there is proper wood in that club or not.

The Court: Overruled.

By Mr. Brobst:

Q. Now, by picking that club up, can you tell whether or not it is strong enough to use in the ordinary braking operations?

Mr. Collins: That is objected to on the ground it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

The Court: Overruled.

The Witness: Well, this club is too light to be of a good grade of wood that will sustain the strain that is put on a brake club when it is applied with any degree of force." [Tr. pp. 80-83, inclusive.]

Mr. Jacobs testified on cross examination:

"By Mr. Collins:

Q. What is the weight of that club? A. Well, I couldn't say. I could only estimate. It would be only two and a half pounds, something like that.

Q. What is the weight of a club that you have in mind? A. Well, it would be approximately half a pound or so heavier than that.

Q. What is the specified weight, do you know? A. No, I don't.

Q. You don't know whether it is 18 pounds, 19 pounds or 36 pounds? A. No, I don't. I don't think there is any specified weight, according to the specifications. If they have any, I have never seen it.

Q. In other words, you are just picking up a club and feeling it in your hand and saying it doesn't feel heavy enough to me? A. I say because I have seen brakes like that being (64) broken before and breaking them myself before.

Q. You just simply picked it up and after holding it in your hand you say you don't think it is quite heavy enough? A. That is right. I don't think it is heavy enough.

Q. And you say that you also base your opinion on the fact that you have seen other clubs that are broken? A. Many of them; yes, sir.

Q. And you have seen all sizes broken? A. I have.

Q. Lightweight, heavyweight, middleweight? Isn't that true? A. Yes.

Mr. Brobst: Let the witness answer. You cut him off all the time.

The Witness: I would like to have the question reread.

(The record referred to was read by the reporter as follows):

('Q. And you have seen all sizes broken? A. I have.

('Q. Lightweight, heavyweight, middleweight? Isn't that true?')

The Witness: I have seen all kinds of clubs broken, and some of them are broken on account of being worn, some of them are broken on account of being inferior quality wood that were not worn, and those that were worn that break, if they are a good club and have been used any length of time the *brake* will be stringy. The break runs through, it will be splintered out, while this is broken in two.

By Mr. Collins:

Q. You don't see any defects in the club, do you?

A. Only the weight.

Q. I asked you about the visible defects. A. There is no visible defects, but if I would pick that club up, if I was going to ride a car, I would use it with a great deal of care.

Q. Just one more question: You said that the weight in the club indicated to you that quality of the wood, didn't you? A. It indicates to me the strength of the wood.

Q. Just wherein does the weight indicate quality?

A. Well, I am not a wood specialist and I can't answer it except only in this way, that I know from my experience if I get a good heavy club I never have any trouble with it breaking, but a light club that is the same size in dimensions as the heavy club is and it breaks, why that is the only thing that I can say."

[Tr. pp. 83-86, inclusive.]

VALNEY BARNETT, recalled as witness on behalf of the plaintiff, testified on direct examination that he did not, at any time, observe any test being made by any of the supply men at any time while he was working in the Tucson yards. [Tr. p. 113.]

ROBERT ADAM GRAHAM, witness called on behalf of the defendant, testified on direct examination that he was Assistant Chief Chemist of the Southern Pacific Company, [Tr. p. 114], and that the brake clubs were purchased from Turner, Day & Woolworth Handle Company,

a division of the American Cork and Pulp Company.
[Tr. p. 127.]

“Q. Now will you tell the jury, or state to the jury if you will, please, how the inspection is made, what procedure is used? A. We get notice from our store department that a new shipment has been received. It is a special form that is submitted to us. We go over to the storehouse and pick at random 20 per cent of the shipment of the brake clubs, either in crates or sacks.

Mr. Brobst: I will object to the testimony, your Honor, (122) in view of the fact that he states that 20 per cent are inspected; unless his inspection is limited to the club in evidence it would become immaterial.

The Court: I think that that has some relevancy as to just what the company does in using ordinary care. Overruled.

By Mr. Collins:

Q. Do you take each shipment as it comes in, is that correct? A. That is correct.

Q. And before any of the clubs are shipped out, in so far as any particular shipment is concerned, do you stamp that shipment as having been inspected by you? A. We have to.

Q. I want you to go into detail as to the method of inspection, the tests that you make—just a moment before we ask that question.

Do you make an inspection of each club in the shipment? A. No, sir. That is impossible.

Q. Now state to the jury in detail the inspection that you make, whether it is one of two kinds, whatever you may do. A. After visible inspection of the shipment is taken at random, six clubs out of each shipment are brought into the testing laboratory.

Q. How many in a shipment? A. It depends on what the order is, according to their (123) consumption.

Q. You take a percentage? A. Yes, sir. There is one correction. I said 20 per cent. It is one out of every 20, which is equal to 5 per cent. That is universal testing practice.

Q. Now state what you do. A. We bring these clubs into the laboratory, check them for their breaking strength, their deflection from the center axis; in other words, we place them in a large machine that fixes the end of the club and the handle end is raised with a traction dynamometer—is similar to a scale—and the force exerted on that club is measured. We measure the actual breaking strength of the club.

We also measure the deflection of the club from the time we start the test to the first evidence of breakage.

When what we found constitutes a good club we hold to that standard.

Q. What pressure do you exert upon a club, or I should say what pressure do you insist a club should stand before it is passed or before any of that shipment is passed? A. At least 500 pounds.

Q. Now in the event you find a defective club from the tests which you make from a shipment, then what if anything do you do? A. We return to the shipment and go through them very (124) carefully because we allow no defects in a brake club.

Q. You mean by that that if you find in the entire shipment just one club you condemn that shipment until further inspection? A. Well, we wouldn't condemn it, we would go through it ourselves, or at

least go through another 5 per cent. If we found a second one we would go through the entire shipment.

Q. Now when you make this test, can you make a test such as you have described on each and every club in the shipment? A. No, sir.

Mr. Brobst: I object to that, your Honor. That is a question for the jury.

Mr. Collins: That is merely preliminary, if your Honor please.

The Court: Overruled. It is preliminary.

By Mr. Collins:

Q. You say you cannot? A. No, sir.

Q. Now will you state to the jury why you cannot make a test on each and every club in the shipment to determine its tensile strength?

Mr. Brobst: I will make the objection to that also, your Honor. That is invading the province of the jury.

The Court: Overruled. (125)

The Witness: Well, if you tested every club—when we test them we destroy them for further use. I think that answers it.

By Mr. Collins:

Q. In other words, when you make a test on a club that club cannot be used? A. It cannot be used.

Q. And if you made a test on each and every club it would destroy the entire shipment? A. That is right.

Q. I take it then that you select at random 5 per cent of the clubs and make a test to determine whether or not they break at less than 500 pounds pressure? A. Yes, sir." [Tr. pp. 130-133, inclusive.]

“Q. I wonder if you will put these pictures in order, commencing at the beginning of the test, so that we may mark them one after another if they are admitted in evidence? A. There are three to a set. (126)

Q. Which are the first three? A. These. They are numbered.

Q. “These are just extra sets? A. Yes.”

* * * * *

“Q. State whether or not in your experience the procedure which you follow with respect to inspection of shipments of brake clubs in the procedure which is generally followed and considered good practice throughout the railroad industry.

Mr. Brobst: I will object to that, your Honor. That is not the test.

The Court: Sustained.

By Mr. Collins:

Q. I hand you laboratory test No. 424-1. State what that represents. A. That represents a handle as set up to make the original first test. It is a new handle. This is a big Olson test machine that we use to hold the club firmly in blocks there. This is a chain hoist with a traction dynamometer, which is equal to a scale.

Q. This is the gauge up at the top? A. This is the gauge, yes. By the pull it registers (127) the pounds.

Mr. Collins: Can we mark “G-1” as the position of the gauge?

Mr. Brobst: Whatever you say is all right.

The Witness: And we have here a steel rule indicating how far the center of the handle is from the

floor. Force is applied by the chain hoist, raising the handle into a position as shown.

By Mr. Collins:

Q. Just a minute. That hoist is then in a position to raise the handle? A. To start the test.

Q. The test has not been commenced? A. No, sir.

Mr. Collins: I offer this in evidence as defendant's exhibit next in order, your Honor.

The Clerk: That will be defendant's Exhibit A.

The Court: Admitted.

(The photograph referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Collins: May I hand it to the jury, if your Honor please?

The Court: Yes." [Tr. pp. 134 and 135.]

* * * * *

“Q. What is this laboratory test No. 424-2? Will you explain it to the jury in detail? A. It is a close-up view of the point of application of force. It shows the end of the handle, where a bolt is placed through the center so the handle will not slip in making the load application.

Q. What is this ruler off at the end? A. This ruler is for measuring the height from the floor. This is more or less to give you an idea how far in from the end of the handle that the load application is made.

Mr. Collins: I offer this as defendant's exhibit next in order.

Mr. Brobst: Why not admit it as one exhibit?

Mr. Collins: I would rather keep them separate.

The Clerk: Defendant's Exhibit B in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit B.) (129)

By Mr. Collins:

Q. Now laboratory test No. 424-3, will you explain what that picture shows? A. That picture shows the club after load has been applied but before fracture. You will note that it is deflected from the center line of the axis about six inches.

Mr. Collins: I offer this as defendant's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant's Exhibit C in evidence.

(The photograph referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Collins: I will pass these to the jury.

(The exhibits referred to were passed to the jury.)

By Mr. Collins:

Q. Now, Mr. Graham, will you examine the brake club that is before you?

By the way, that club has not been introduced in evidence, if your Honor please.

Mr. Brobst: Yes, I put it in.

The Clerk: It is Plaintiff's Exhibit 1.

By Mr. Collins:

Q. Will you make an examination of Plaintiff's Exhibit 1? A. Yes, sir. (130)

Q. Have you already examined it? A. I have.

Q. Have you examined it in the laboratory at Sacramento? A. I looked at the fracture.

Q. I will ask you whether or not, outside of putting this club in a machine such as you have demonstrated in Defendant's Exhibits A, B and C, whether or not there was any way to determine whether or not there was any flaw in this club.
A. No, sir.

Q. I will ask you whether or not the wood from the outside would pass inspection, or would you have passed it as a good and sufficient club? A. I would.

Q. How can you tell the jury in your opinion what caused this club to break? A. Not knowing how it was applied, from the appearance of the wood itself, rather short in fibre, which an inspection couldn't tell without breaking, there is no surface indication. The short end fibre means it is a little bit weak. In combination with the application it might have caused a failure. I notice here some new gashes and the method of applying it might not have been the proper manner.

Q. But in any event of course you don't know how it was (131) applied? A. No.

Q. There is no way of discovering the defect of this club prior to the time it was broken other than taking the club and putting it in a machine and breaking it in half? A. No, sir.

Mr. Collins: You may cross examine.

Cross Examination

By Mr. Brobst:

Q. How much pressure does the ordinary brakeman exert on a club such as that? A. That is something that has never been determined.

Q. You have never determined that? A. No, sir.

Q. Yet you say that a safe test would be 500 pounds? A. That is what we have taken for granted.

Q. Have you just fixed that standard without knowing how much pressure the ordinary man exerts on one of these during the course of his ordinary work? A. Well, I am not in that department. I wouldn't know unless I actually made tests.

Q. Then you just determine these things are safe by some standard that is given to you? A. So many factors enter into it, your deflection, your braking load. Of all the tests made the average is 800 pounds per club. It varies according to the clubs.

Q. You said 500. Q. 500 is the minimum. Anything below 500 we wouldn't accept.

Q. But you fix that standard without knowing what the requirements are of the men in the field, how much pressure they exert when they have to fasten up one of these brakes? A. That is not known.

Q. So then actually you don't know whether it is safe or not out in the field because you don't know whether or not they exert more than 500 pounds when they have to tighten up one of these brakes on freightcars on a grade? A. The only thing we can go by is the past record to get the best handle we can.

Q. After a brake club has been used and put back you don't then give it a second test, do you? A. No, sir.

Q. What use it has been subjected to you have no way of determining? A. No.

Q. Then the supply man on the job gives it no test? A. I don't know.

Q. So that it is used, or rather it is put back in a can and no matter what its condition is it is put back for the other men to use? (133) A. That is out of my department.

Q. You don't know anything about that? A. Not the road use.

Q. As far as any test is concerned at the actual scene where the club is used and reused, you know nothing about those tests? A. That is right.

Q. And these clubs are sent out as being safe when you take one out of 20 and if it passes inspection the other 19 go out to be used? A. That is universally accepted with all inspection.

Q. Whether or not they are going to exert more than 500 pounds on each club, you don't know that? A. No, sir." [Tr. pp. 136-140, inclusive.]

LESLIE ARTHUR ESTES, called as a witness on behalf of the defendant, testified as follows:

"Direct Examination

By Mr. Collins:

Q. Mr. Estes, your business is what? A. Head buyer.

Q. For whom? A. Southern Pacific Company.

Q. Over what period of time? A. I started in 1913 and for the past 15 years approximately I have been head buyer.

Q. Do you have under your supervision the purchasing of brake clubs? A. Yes, sir.

Q. For what period of time? A. Possibly 15 years.

Q. From whom do you purchase those? A. Throughout that period we have been buying from the Turner, Day & Woolworth Handle Company.

Q. Have you had occasion to discuss the purchasing of brake clubs from other firms? A. Yes, sir. During that period other concerns have desired and have submitted prices on brake clubs that in some cases have been lower than the brake clubs that we buy from Turner, Day & Woolworth, but we have refrained from considering such purchases due to quality that we have been getting from Turner, Day & Woolworth Handle Company. (135)

Q. In the trade, do you know anything about the reputation of Turner, Day & Woolworth Handle Company? A. To my knowledge they are considered one of the leading tool handle manufacturers.

Q. When you say tools, are you including brake clubs? A. That answer includes brake clubs; yes, sir.

Q. Now do you know whether or not they are a manufacturing concern of recognized standing? A. Yes, sir.

Q. I will ask you whether or not, in conjunction with the United States Department of Commerce, or with the United States Department of Commerce you carried on an investigation and recommendation as to the kind of wood to use in brake clubs and

other wooden instrumentalities.” [Tr. pp. 140 and 141.]

* * * * *

“The Witness: That is a fact.” [Tr. p. 142.]

KENNETH W. KNIGHT, called as a witness on behalf of the defendant, testified as follows:

“Direct Examination

By Mr. Collins:

Q. Mr. Knight, what has been your business over the last 10 years? A. I have been connected with wholesale hardware.

Q. Were you a purchasing agent? A. I have been connected with purchasing wholesale hardware for the last five years.

Q. And in connection with that position of yours, did you have occasion to learn from the trade the reliability or the reputation of various manufacturers? A. Yes, sir.

Q. I ask you whether or not you are acquainted with Turner, Day & Woolworth Handle Company, which is now a division of the American Cork and Pulp Company? A. I am.

Q. Over what period of time? A. Directly for two and a half years as assistant to the purchasing agent at the California Hardware, at which 100 per cent of our handles were bought from Turner, Day & Woolworth.

Q. I assume you have also had transactions or correspondence, together with consultation with other manufacturers of hardwood handles, such as brake clubs, axe handles, hoe handles and such? (119)

A. Yes.

Q. I will ask you whether or not by reason of your experience in the relationship with the trade whether the Turner, Day & Woolworth Handle Company is a reputable firm? A. Yes, they are.

Q. And can you state whether or not it is a manufacturer of recognized standard among the trade? A. That is right; they are.

Q. And in your opinion will you state whether or not that manufacturer is a company that can be depended upon to produce, I should say send to the trade, reputable, substantial standard products which you purchase from them?

Mr. Brobst: I will object to that question, Your Honor, on the ground it is argumentative. I have no objection to the reputation but whether they can be depended upon is argumentative.

The Court: I think it is argumentative. Sustained.

By Mr. Collins:

Q. What, in your opinion, is the reputation and dependability of the Turner, Day and Woolworth Handle Company? A. They have a reputation of furnishing a first-rate handle of all types." [Tr. pp. 127-129, incl.]

The Basis of Plaintiff's Case.

The plaintiff's case was based solely and entirely on the contention that the defendant was guilty of negligence and had violated the provisions of the Federal Employer's Liability Act, 45 U. S. C. A. 51, *et seq.*, as amended August 11, 1939, which reads as follows:

“LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such

commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.”

Specification of Errors.

1. The Court erred in permitting the jury to determine whether the brake club was a part of the hand brake within the meaning of the Safety Appliance Act, under the following Instruction, viz.,

“If you find from a preponderance of the evidence that the hand brake on the tank car in question would not operate efficiently without the use of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions which I will give you.

“Where plaintiff’s contributory negligence and defendant’s violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers’ Liability Act requires plaintiff’s contributory negligence, if any, be disregarded.”

2. The Court erred in failing and refusing to hold, as a matter of law, that the brake club was not a part of the hand brake within the meaning of the Safety Appliance Act.

3. The Court erred in refusing to grant defendant’s motion for a new trial on grounds that the evidence, as a matter of law, was insufficient to support the verdict.

SPECIFICATION OF ERROR NOS. I AND II.

Safety Appliance Act Does Not Apply. It Was Error to Submit That Issue to the Jury.

Specifications of Error numbered 1 and 2, are so related and supported by common decisions, that for the purposes of this argument, they will be grouped and jointly presented. Defendant contends that the brake club was, as a matter of law, not a part of the hand brake within the meaning of the Safety Appliance Act and the orders of the Interstate Commerce Commission; and that the Court erred in failing to so declare, and committed prejudicial error in allowing the jury to determine, as a matter of fact, whether the brake club was a part of the hand brake within the meaning of the Safety Appliance Act.

At the request of the plaintiff and over the objections and exceptions of the defendant, the Court gave two instructions to the jury based upon the Safety Appliance Act, (United States Code, Title 45, Sections 11 and 12).

These instructions (above quoted) are to be found at page 211, Transcript of Record, and are as follows:

“If you find from a preponderance of the evidence that the hand brake on the tank car in question would not operate efficiently without the use of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the hand brake on the tank car, then and in that event only, you may apply the following instructions which I will give you.

“Where plaintiff’s contributory negligence and defendant’s violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers’ Liability Act requires plaintiff’s contributory negligence, if any, be disregarded.”

By the foregoing instructions the Court in effect attempted to delegate judicial power to the jury, in the exercise of which the jury necessarily was called upon to construe the provisions of the Safety Appliance Act. To put the matter another way, the Court by these two instructions permitted the jury to determine whether the brake club was a part of the hand brake *within the meaning* of the Safety Appliance Act (45 U. S. C. A., Sec. 11). In so doing, the Court disregarded Section 2102 of the Code of Civil Procedure of California, which exclusively vests the construction of statutes in the Court. Section 2102 provides:

“All questions of law, including the admissibility of testimony, the facts preliminary to such admission *and the construction of statutes and other writings*, and other rules of evidence, *are to be decided by the Court* and all discussions of law addressed to it. * * *” (Emphasis supplied).

The scope of the requirements of the Safety Appliance Act and the orders of the Interstate Commerce Commission, were under the undisputed evidence, solely a question of law for the Court to determine and not an issue of fact for the jury. The inevitable result of this surrender of duty was to by-pass and do violence to such pertinent decisions as *Baltimore & O. R. Co. v. Hooven* (C. C. A. 6), 297 Fed. 919; *New York C. & St. L. R. Co. v. Kelley* (C. C. A. 7), 70 F. (2d) 548; *Sherry v. Baltimore & O. R. Co.* (C. C. A. 6), 30 F. (2d) 487, certiorari denied 280 U. S. 555, 74 L. Ed. 611; *Kaminski v. Chicago M. St. P. & P. R. Co.* (Minn.), 231 N. W. 189, certiorari denied 282 U. S. 872, 75 L. Ed. 770; and *Harlan v. Wabash Ry. Co.* (Mo.), 73 S. W. (2d) 749,—wherein it was

expressly held, *as a matter of law*, that a locomotive or car reaching an established place of repair and undergoing repairs at that point, is not “*in use*” on the carriers line, nor is it at that time and place engaged in the active service of the carrier within the meaning of the Boiler Inspection Act (45 U. S. C. A. Section 23.) See also *Noftz v. Baltimore & O. R. Co.* (C. C. A. 6), 13 F. (2d) 389.

In *Compton v. Southern Pacific Co.*, 70 Cal. App. (2d) 267, 161 P. (2d) 40, the California Court held that it was reversible error for the trial court to submit to the jury, as an issue of fact, the question of whether a locomotive undergoing repairs in a roundhouse was *in “use” on the “carrier’s line”* within the provisions of the Boiler Inspection Act. In reversing the case, the District Court of Appeal expressly held that the construction of the statute and the issue of its violation were essentially and exclusively questions of law to be determined by the Court, and could in no sense be regarded as issues of fact for a jury to determine. The law is well settled in California that the question of whether a statute is applicable to the facts upon which a recovery is sought is in all instances a matter of law for the Court to determine. *Campbell v. City of Santa Monica*, 51 Cal. App. (2d) 626, 629, 125 P. (2d) 561; *Clarke v. Foster’s Inc.*, 51 Cal. App. (2d) 411, 414, 125 P. (2d) 60; *Bodinson Mfg. Co. v. California E. Com.*, 17 Cal. (2d) 321, 326, 109 P. (2d) 935; *Whittman v. Steiger*, 46 Cal. 256; *Holtman v. Butterfield*, 51 Cal. App. 89, 92, 196 Pac. 85; *People v. Kaufman*, 49 Cal. App. 570, 572, 193 Pac. 573.

The provisions of the Safety Appliance Act are mandatory and penal in nature. Sections 11 and 12 of the Safety Appliance Act (45 U. S. C. A., Sections 11 and 12), provide as follows:

“§ 11. Safety appliances required for each car; when hand brakes may be omitted

“It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, § 2, 36 Stat, 298.* * *”

“§ 12. Safety appliances, as designated by commission, to be standards of equipment; modification of standard height of drawbars

“The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this title as designated by the Interstate Commerce Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of sections 1-16 of this title, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any

such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of sections 11-16 of this title. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. Apr. 14, 1910, c. 160, § 3, 36 Stat. 298.

* * *

To justify a recovery of damages under the Safety Appliance Act, the plaintiff who claims the benefit of that statute must affirmatively show a violation or breach thereof by the carrier. The provisions of the Safety Appliance Act, which we have just quoted, do not by their terms encompass a brake club, and the record is devoid of evidence that the defendant failed to comply with any of the standards imposed by the Safety Appliance Act or ordered by the Interstate Commerce Commission, with respect to the maintenance and construction of the hand brake. There was, therefore, a complete failure of proof upon the part of the plaintiff in respect to showing a violation of the Safety Appliance Act or a violation of any order of the Interstate Commerce Commission. In the absence of a showing that defendant violated the provisions of the Safety Appliance Act, or violated an order of the Interstate Commerce Commission, defendant is entitled to the presumption that its hand brake fully and completely complied with the law and the orders of the Interstate Commerce Commission concerning hand

brakes. A copy of the regulations of the Interstate Commerce Commission in this respect, is attached hereto and will be found in the appendix.

On September 29th and 30th, and October 7th, 1910, and on February 27th, 1911, hearings were held before the Interstate Commerce Commission at its offices in Washington, D. C., to consider the matter of the number, dimensions, location and manner of application of the appliances in accordance with the provisions of Section 3 of the above named act of Congress; and on March 13, 1911 the Interstate Commerce Commission made its order designating the number, dimensions, location and manner of application of various safety appliances among which was that of hand brakes; this order, so far as it relates to the particular safety appliance involved in this case, has never been amended and is now in full force and effect. Vol. 2, *Roberts Federal Liabilities of Carriers*, pages 2010-2013, inclusive: The order of the commission with respect to hand brakes are set forth on pages 1 to 3 in the appendix to this Brief.

The mandate of the Safety Appliance Act embraces only specific appliances and is limited to certain designated requirements in respect to such appliances. *Roberts Federal Liabilities of Carriers*, Section 562.

In the case of *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 318, 326, 328, 60 L. Ed. 1022, 1026, it is said:

“It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become sub-

ject to heavy penalties, and, in respect to transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium.*'"

Nowhere in the Act or the orders of the Commission is there any provision designating the dimensions or weight or other factors of a brake club, or making a brake club a part of the hand brake, or subject to the standards set up for the construction and maintenance of hand brakes. No penalty is imposed upon the carrier irrespective of the kind, shape or dimensions used by the carrier with respect to the brake club. Brake clubs are used by the employees of the company for various purposes such as assisting the user to set up a brake [Tr. p. 42], knocking the dog off of the brake staff, and for a hammer. [Tr. pp. 113 and 114]. The brake club is a contrivance separate and distinct, and designed and used for purposes separately and apart from the brake appliance, and it does not constitute any part of the brake mechanism covered by the Act or the orders of the Interstate Commerce Commission.

The case of *Scarlett v. Atchison, Topeka & Santa Fe Railway Company* was brought in the Superior Court of the State of California, in and for the County of Los Angeles, under the provisions of the Safety Appliance Act and resulted in a verdict in favor of the plaintiff and against the railroad company in the sum of \$18,000.00. Mr. Scarlett was injured while descending from a box

car by means of a ladder attached to the side of the car. His foot slipped on a round brace rod also attached to the car immediately behind the ladder, causing him to fall to the ground. The ladder itself was not defective. The ladder complied with the regulations of the Interstate Commerce Commission made in pursuance of the Act "United States Safety Appliance Standards" order of March 13, 1911. The Supreme Court of California, 7 Cal. (2d) 181, 60 P. (2d) 462, affirmed the judgment in favor of the plaintiff applying the Safety Appliance Act to the facts of the case.

The Supreme Court of the United States reviewed the case of *Atchison, Topeka & Santa Fe Railway Company v. William W. Scarlett*, 300 U. S. 471, 81 L. Ed. 749, and held in effect that the Safety Appliance Act applied *only* to those appliances coming within the Act and covered by orders of the Interstate Commerce Commission in pursuance to the authority invested in that body by the Safety Appliance Act. In this respect the Court said:

"* * * we may fairly presume that the Interstate Commerce Commission in the performance of its duties was aware of the situation, and knowingly permitted its rule in respect of the ladder clearance to remain without change. Compare *Pennell v. Philadelphia & R. R. Co.* 231 U. S. 675, 680, 58 L. ed. 430, 434, 34 S. Ct. 220. The regulation having been made by the commission in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute. And the railway company having strictly complied with the regulation has discharged its full duty so far as the ladder requirement of the Safety Appliance Act is concerned. The judgment of the trial court and jury cannot be

substituted for that of the commission. See *Kansas City S. R. Co. v. United States*, 231 U. S. 423, 456, 457, 58 L. ed. 296, 309, 310, 34 S. Ct. 125, 52 L. R. A. (N. S.) 1; *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611, 612, 71 L. ed. 432, 438, 439, 47 S. Ct. 207; *Mahutga v. Minneapolis, St. P. & S. Ste. M. R. Co.* 182 Minn. 362, 366, 234 N. W. 474; *Auschwitz v. Wabash R. Co.*, 346 Ill. 190, 204, 178 N. E. 403; *Ford v. New York, N. H. & H. R. Co.* (C. C. A. 2d) 54 F. (2d) 342, 343.

In *Illinois C. R. Co. v. Williams*, 242 U. S. 462, 466, 61 L. ed. 437, 440, 37 S. Ct. 128, we held that §2 of the act requiring secure ladders, etc., was operative pending action by the Interstate Commerce Commission under §3. In the interim, we said §2 had the effect of prescribing an absolute and imperative duty, of making the ladders and other appliances 'secure;' but that §3 contemplated that these appliances 'shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission, that is, that they shall be standardized . . .'

We do not see how it reasonably can be said that the brace rod constitutes a part of the ladder. In itself, it was a contrivance separate and distinct from the ladder, designed and used for a purpose entirely apart from the use of that appliance. The right of recovery, if any, must, therefore, rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act, and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett

assumed the risk. *Ford v. New York, N. H. & H. R. Co.* (C. C. A. 2d), 54 F. (2d) 342, *supra*; *Chicago, R. I. & P. R. Co. v. Benson*, 352 Ill. 195, 199, 185 N. E. 244; *Slater v. Chicago, St. P. M. & O. R. Co.* 146 Minn. 390, 392, 393, 178 N. W. 813. In that view, Scarlett in abandoning his claim under the common-law rule of negligence abandoned the only possible ground of recovery.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.”

In the case of *Ford v. New York, N. H. & H. R. Co.*, 54 F. (2d) 342, the plaintiff alleged a violation of the Safety Appliance and Boiler Inspection Acts (Safety Appliance Act of March 2, 1893, c. 196, § 4, 27 Stat. 531 (45 U. S. C. A. §4); Boiler Inspection Act of February 17, 1911, c. 103, §2, 36 Stat. 913). The Safety Appliance standards for locomotives, fixed by the Interstate Commerce Commission order of March 13, 1911, required steam locomotives used in road service to have side handholds, which, if vertical, must be of clear length equal to the approximate height of the tank, and they are required to be located, if vertical, one on each side of the tender within six inches of the rear. The handholds conformed to the orders of the Interstate Commerce Commission, but there was grease on the handholds which caused the plaintiff to fall and be injured. In affirming a judgment of a dismissal of the complaint and entry of judgment in favor of the defendant, the Court said:

“We think the Safety Appliance and Boiler Inspection Acts have no application under these circumstances. When the carrier complied with the requirement of the Interstate Commerce Commission order by having the handholds and maintained them

in good repair, they were for the purpose of the statute in proper condition and safe for operation. *Erie R. R. v. Lindquist*, 27 F. (2d) 98 (C. C. A. 3); *Lehigh & N. E. Ry. v. Smale*, 19 F. (2d) 67 (C. C. A. 3). Having made the tender safe to operate, if later it became unsafe by putting grease on the handhold, even if such was negligently caused, it is not a violation of the statutory obligation of the appellee. The tender was lawfully equipped with proper equipment by way of handholds, which was an absolute duty imposed by statutory law. The act of putting grease thereon later may have been a violation of the relative duty imposed by general law upon the employer. But counsel has insisted upon resting his case solely upon the claim of violation of the statutory law. If during the operation the safety appliance required by the act was rendered temporarily unsafe by reason of the grease placed thereon, this is not a condition which brings it within the purview of the act. *Fredericks v. Erie R. R.*, 36 F. (2d) 716 (C. C. A. 2); *B. & O. R. R. v. Hooven*, 297 Fed. 919 (C. C. A. 6).

It was not the intent of Congress to make the railway company responsible for grease on the handhold, imposed as an absolute obligation. Congress intended to and quite properly imposed absolute liability upon the railroad company for proper railroad equipment and safety appliances, in the construction and maintenance of locomotives and tenders. The Federal Employers' Liability Act (chapter 149, §1, 35 Stat. 65 (45 U. S. C. A. §51)), make express reference to cars, engines, and appliances, but, in order to recover under this act, it is necessary for a plaintiff to prove negligence. Under the Safety Appliance and Boiler Inspection Acts, it is not neces-

sary to prove negligence, but failure to comply with the requirements of the act implies negligence. *Texas & P. Ry. v. Rigsby*, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874. If the appellant's theory were accepted to impose liability, it would also modify the requirements of the Federal Employers' Liability Act (45 U. S. C. A. §§51-59) so as to establish negligence for a plaintiff's recovery thereunder. A railroad company can be required to equip its cars with necessary safety appliances, but it cannot be held responsible for every careless act.

An examination of the debates in Congress on the passage of these acts, shows no intention by Congress to impose civil liability for a condition occurring during the operation of the train which does not affect the construction and maintenance as required by the Safety Appliance Act. 61st Congress, 2d Session, Senate Documents, 446; 52d Congress, vol. 23, Congressional Record, p. 5925; volume 24, pp. 1273-1287; Senate Committee Report, vol. 24, Congressional Record, pp. 1246-1251."

Baltimore & Ohio Railroad Company v. Groeger, 266 U. S. 521, 69 L. Ed. 419, is a case arising out of the death of John C. Groeger, engineer who was killed in a boiler explosion. The action was brought under the Boiler Inspection Act (Safety Appliance Act). The Court submitted for the decision of the jury two issues; the first which we are not here concerned, the second whether defendant's failure to have a fusible plug in the crown sheet violated Section 2 of the Boiler Inspection Act. Verdict went for the plaintiff. The Supreme Court, in passing upon the propriety of the trial court in permitting the

jury to interpret the Boiler Inspection Act, said in considering this question:

“If the question whether the standard of duty fixed by the act required defendant to have a fusible plug in the crown sheet of the boiler were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. But we think the question was *not* for the jury. *Southern P. Co. v. Seley*, 152 U. S. 145, 150, 30 L. Ed. 391, 393, 14 Sup. Ct. Rep. 530; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 194, 30 L. ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 483, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; *Kilpatrick v. Choctaw, O. & G. R. Co.* 57 C. C. A. 255, 121 Fed. 11; *Richards v. Rough*, 53 Mich. 212, 216, 18 N. W. 785. And see *Southern P. Co. v. Berkshire*, 254 U. S. 415, 417, 65 L. ed. 335, 337, 41 Sup. Ct. Rep. 162. The act required a condition which would permit use of the locomotive without unnecessary danger. It left to the carrier the choice of means to be employed to effect that result. While the burden was on the plaintiff to prove a violation of the act by defendant, she was not bound to show that any particular contrivance or invention was suitable or necessary to have and keep the boiler in proper condition. There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. It is not for the

courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers, will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end. *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 194, 30 L. ed. 1116, 7 Sup. Ct. Rep. 1166; *Richards v. Rough*, 53 Mich. 216, 18 N. W. 785. The presence or absence of a fusible plug was a matter properly to be taken into consideration in connection with other facts bearing upon the kind and condition of the boiler in determining the essential and ultimate question, *i. e.*, whether the boiler was in the condition required by the act.

But we think the court erred in instructing the jury that defendant was bound to avail itself of 'the best mechanical contrivances and inventions in known practical use which are or would be effective in making safe a locomotive boiler as against explosions;' and also erred in authorizing the jury to decide that 'the standard of duty imposed by the law required a fusible safety plug to be installed,' and that 'the absence of the fusible safety plug would impose upon the defendant here an absolute liability.'

Judgment reversed."

The decisions of the courts support the proposition that when a safety appliance conforms with and is maintained in accordance with the standards fixed by the In-

terstate Commerce Commission it constitutes a full compliance with the law. If the Court was correct in submitting the interpretation of the Safety Appliance Act to the jury, then the requirements of the Act that the Interstate Commerce Commission fix the standards is of no effect whatsoever.

A state is not permitted to establish the standards adopted under the Act, and certainly a jury is not in as good a position to determine such questions as the legislative body of the state.

In *Napier et al. v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 71 L. Ed. 432, the facts are briefly as follows: A statute of the state of Georgia, the execution of which was sought to be enjoined, required that all steam locomotives of a specified type be equipped with an automatic door to the fire-box, of a construction therein described. The question involved was whether, in view of the congressional legislation on the subject, the state of Georgia could enforce its statute. The Supreme Court held that the power to require carriers engaged in interstate commerce, with respect to safety appliances, rested solely with the Interstate Commerce Commission, and in this regard Mr. Justice Brandeis said:

“The requirements here in question are, in their nature, within the scope of the authority delegated to the commission. An automatic fire door and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. It is argued that the authority delegated to the commission does not extend to ordering the use or installation of equipment of any kind,

Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 69 L. ed. 419, 45 Sup. Ct. Rep. 169; and that Congress has definitely reserved that power to itself, Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; Atlantic Coast Line R. Co. v. Georgia, *supra*; United States v. Pennsylvania R. Co., 242 U. S. 208, 61 L. ed. 251, 37 Sup. Ct. Rep. 95. The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in Vandalia R. Co. v. Public Serv. Commission, 242 U. S. 255, 61 L. ed. 276, P. U. R. 1917B, 1004, 37 Sup. Ct. Rep. 93. We think that power was conferred. *The duty of the commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the commission sets the standard. By setting the standard it imposes requirements.* (Italics ours.)

The power to require specific devices was exercised before the Amendment of 1915, and has been extensively exercised since.

'The argument mainly urged by the states in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation,

rather than the physical elements affected by it. Did Congress intend that here might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

'The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automatic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We held that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. Because *the standard set by the commission must prevail*, requirements by the statute are precluded, however commendable or however different their purpose. Compare *Louisville & N. R. Co. v. State*, 16 Ala. App. 199, 76 So. 505; *Whish v. Public Serv. Commission*, 205 App. Div. 756, 200 N. Y. Supp. 282, 240 N. Y. 677, 148 N. E. 755; *Staten Island Rapid Transit Co. v. Public Serv. Commission*, 16 F. (2d) 313. (Italics ours.)

'If the protection now afforded by the commission's rules is deemed inadequate, application for relief must be made to it. The commission's power is ample.

Obviously, the rules to be prescribed for this purpose need not be uniform throughout the United States; or at all seasons; or for all classes of service.' ”

It seems abundantly clear that the trial court erred in failing to hold that the brake club was not a part of the hand brake within the meaning of the Safety Appliance Act. It is equally clear that the trial court erred further in instructing the jury upon the Safety Appliance Act and the absolute liability thereunder imposed, and then delegating to the jury the province of construing the Safety Appliance Act to determine whether a brake club was a part of the hand brake within the meaning of that term as applied in the Safety Appliance Act. The giving of the instructions set forth in Specification of Error numbered 1, empowered the jury to determine the applicability of the Safety Appliance Act under evidence which was undisputed. The applicability of the Safety Appliance Act to the undisputed facts was essentially and exclusively a matter of law to be determined by the Court. It was error of the most prejudicial sort for the trial court to submit the case to the jury on the theory that they might find a violation of the Safety Appliance Act with consequent, absolute and full liability upon the part of the defendant. Thereby, the defendant was stripped and deprived of all defenses to plaintiff's cause of action under the Federal Employers' Liability Act, inclusive of the defense of contributory negligence. The error is particularly evident in view of the failure of the plaintiff to establish a violation of the Safety Appliance Act or of the orders of the Interstate Commerce Commission, which he was required to do in order to sustain his burden of proof, and to bring his case within the provisions of the Safety Appliance Act whose benefits he was claiming.

SPECIFICATION OF ERROR NO. III.

The Court Committed Error in Refusing to Grant Defendant's Motion for New Trial on Grounds That the Evidence, as a Matter of Law, Was Insufficient to Support the Verdict.

The evidence is undisputed that the plaintiff purchased the brake clubs from the Turner, Day and Woolworth Handle Company, a division of the American Cork and Pulp Company. [Tr. pp. 127 and 129.] Mr. Kenneth W. Knight testified that he had been connected with the wholesale hardware business for a period of ten years; that for the last five years he had been connected with purchasing of wholesale hardware [Tr. p. 127]; that for two and a half years he was assistant to the purchasing agent of the California Hardware Company; that by reason of his position he had learned from the trade the reliability and reputation of various manufacturers. [Tr. p. 128.] He further testified that the Turner, Day and Woolworth Handle Company was a responsible firm [Tr. p. 128] and had the reputation of furnishing a first-rate product. [Tr. p. 129.]

Mr. Leslie Arthur Estes testified that he was the buyer for the Southern Pacific Company and had been for fifteen years: that he supervised the purchasing of brake clubs [Tr. p. 140]; that throughout the period the Southern Pacific Company had been buying from Turner, Day and Woolworth Handle Company; that he had discussed purchasing brake clubs from other firms; that other firms had submitted prices on brake clubs which were lower than those purchased from Turner, Day and Woolworth Handle Company; that he purchased from Turner, Day and Woolworth Handle Company because of the quality of their product; that Turner, Day and Woolworth Handle Com-

pany were considered one of the leading tool manufacturers; that tools included brake clubs [Tr. pp. 140 and 141]; that in conjunction with the United States Department of Commerce he had carried on an investigation as to the kind of wood to be used in brake clubs. [Tr. p. 142.]

Mr. Robert Adam Graham, Chemist for the Southern Pacific Company, testified that upon the receipt of a shipment of clubs that the shipment was personally inspected by him and the inspection consisted of a visual inspection by inspecting one club out of every twenty, which is equal to five per cent; that such inspection is universal testing practice [Tr. pp. 129-131, incl.], and that then the clubs are brought into the laboratory and checked for their breaking strength and their deflection from the center axis by placing them in a large machine that fixes the end of the club, and the handle end is raised with a traction dynamometer (is similar to a scale) and the force exerted on the club is measured; that he measured the actual breaking strength of the clubs; that the defendant required that a club should withstand a pressure of at least 500 pounds. In the event a defective club appears from the tests, he returned to the shipment and went through it very carefully because the company allowed no defects in a brake club; that he would not condemn the entire shipment if one defective brake club was found, but he would then go through another five per cent and if he found a second one defective he would go through the entire shipment [Tr. p. 132]; that he could not test every brake club in the shipment to determine its tensile strength; that when a brake club is tested it is destroyed for further use; that if a test were made on each and every club, it would destroy the entire shipment; five per cent of the clubs are selected at random and tested to determine whether or not

they will withstand pressure of 500 pounds. [Tr. p. 133.] Three pictures showing the laboratory tests were used to demonstrate the method used in testing the brake clubs. Laboratory Test No. 424-1 represents a handle set up to make the original first test. It is a new handle. This is a big Olson testing machine which is used to hold the clubs firmly in the block; there is a gauge which registers the pounds of pressure exerted upon the handle; a steel rule is used to indicate how far the center of the handle is from the floor; force is applied by means of a chain hoist with a traction dynamometer which raises the handle into the position shown in Laboratory Test No. 424-1; the hoist is then in the position to start the tests. [Tr. pp. 134 and 135.] A picture of Laboratory Test No. 424-1 was thereupon received in evidence as Defendant's Exhibit A.

Laboratory Test No. 424-2 is a closeup view of the point of application of force. It shows the end of the handle where a bolt is placed through the center so the handle will not slip in making the load application. The ruler at the end is for measuring the height from the floor. Laboratory Test No. 424-2 was thereupon received in evidence as Defendant's Exhibit B.

Laboratory Test No. 424-3 shows the club after the load has been applied but before fracture. The handle is deflected from the center line of the axis about six inches. Laboratory Test No. 424-3 was thereupon received in evidence as Defendant's Exhibit C. For the convenience of the Court there will be found in the appendix photographs of Defendant's Exhibits A—424-1, B—424-2 and C—424-3 without the marks placed upon them by the witness.

Mr. Graham examined Plaintiff's Exhibit No. 1 and stated that from the appearance of the wood on the outside that he would have passed it as a good and sufficient club, and that there was no way of discovering the defect in the club prior to the time it was broken other than by putting it in the machine and breaking it. [Tr. pp. 137 and 138.] His testimony in this significant aspect of the case stands unchallenged and undisputed.

The clubs are sent out as being safe when one out of twenty passes inspection. The other nineteen go out to be used, which is the practice universally accepted. [Tr. p. 140.]

Mr. Carson, the plaintiff, testified that when he went to work he could select a brake club from any number that were present and in the event a brake club is there, which in his opinion had been used a sufficient length of time, he had a right to take another one and that any brake club that appeared to be defective he had a right to reject, and that he would be given a new brake club. [Tr. p. 56.] That on the morning he selected the brake club in question the brake club appeared practically new and that he examined it, found no flaws or defects which were visible and that no examination as far as he was concerned revealed any defect whatsoever in the manufacture or construction of the club up until the time it broke. [Tr. p. 57.]

Mr. Wilson D. Jacobs, witness produced by the plaintiff, examined the broken brake club in the presence of the jury and stated that it was the type of brake club used on the Los Angeles Division of the Southern Pacific Company for a good many years—approximately fifteen or eighteen years [Tr. p. 79]; that he did not know what

the tensile strength of oak was; that he could not pick up a piece of wood and tell whether it was first or second growth; that he was not a wood specialist. [Tr. p. 82.] He thereupon testified, over the objection of the defendant, that by picking up a club he could tell whether or not it was strong enough to use in ordinary braking operations; that the club was too light to be of a good grade of wood to sustain the strain put on a brake club when any degree of force was applied to it. [Tr. p. 83.] When asked the weight of the club on cross-examination he stated that it would be only two and a half pounds, something like that, and that the club that he had in mind would weigh approximately a half pound or so heavier; that he did not know the specified weight of the clubs, and that there was no specified weight according to the specifications, and that upon picking up the club in his hand it was his opinion that he didn't think it was quite heavy enough. [Tr. p. 84.]

We quoted the testimony of Mr. Jacobs with reference to his opinion that the club was too light not because, in our opinion, it had any probative value as to whether or not the Southern Pacific Company had exercised reasonable care in the selection of its clubs, but only for the purpose of including all the testimony in connection with this point.

We believe the undisputed evidence shows in this case that the Southern Pacific Company bought from a reputable manufacturer, inspected the clubs, made mechanical tests, which are universally accepted as a means of determining whether or not an article is good or bad, and that when it had exhausted all the reasonable means it had at its command to test the clubs, it thereby performed its duty and obligation to its employees, and that a charge of

negligence cannot be predicated upon the mere fact that one club out of a shipment was found to be defective, and where such defect could not be discovered without destroying the usefulness of the club itself.

In the case of *Lowden, et al. v. Hanson*, 134 Fed. Rep. (2d) 348, where a brake standard purchased from a reputable manufacturing concern broke and an employee was injured, Mr. Justice Gardner, of the Eighth Circuit Court of Appeals, states the rule to be:

“They were under the continuing duty of exercising ordinary care to see that the instrumentalities and appliances furnished for the use of plaintiff, as well as the premises where he was required to work, were maintained in a reasonably safe condition. *Phillips Petroleum Co. v. Manning*, 8 Cir., 81 F. 2d 849. It was, therefore, their duty to have the appliances so furnished inspected from time to time. Here it appears from the undisputed evidence that this spring switch stand was one of standard make, in general use and manufactured by a reputable manufacturer. When received and installed it was in the nature of a unit and not dismantled; there was no evidence that it was not properly installed so that in the first instance it cannot be said that the defendants failed to exercise ordinary care in supplying, furnishing and installing this equipment. *Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 13 S. Ct. 837, 37 L. Ed. 728; *Clarkson Coal & Dock Co. v. Northern Lakes S. S. Co.*, 8 Cir., 251 F. 181; *Jenkins v. St. Paul City R. Co.*, 105 Minn. 504, 117 N. W. 928, 20 L. R. A., N. S., 401. Of course, the rule could not be invoked if the appliance or equipment were patently and openly defective. But there was nothing about this finished product indicating to the naked eye

that it was at the time it was installed deficient in any particular, and no one is required to guard against that which a reasonably prudent person under the circumstances could not anticipate as likely to happen (*Ft. Smith Gas Co. v. Cloud*, 8 Cir., 75 F. 2d 413, 97 A. L. R. 833); the equipment having been purchased from a reputable manufacturer, we are clear that the defendants could not be charged with negligence because of any structural or inherent defect which was not patent at the time of its installation. Defendants were warranted in assuming in the absence of any notice to the contrary, that the equipment was without structural defects, and it was not incumbent upon them to dismantle the appliance and separate it into its various parts for the purpose of discovering possible defects. It was manufactured, assembled, inspected and tested by experts before it was ever placed upon the market. This was implied from the fact that the manufacturer was a reputable one. While it was the duty of defendants to inspect this appliance, it is our view that in the absence of any evidence that it was not properly functioning, defendants were not required to dismantle the appliance and submit it to a microscopic inspection or the other scientific tests suggested by one of the witnesses for the purpose of discovering possible structural defects. The functioning of the switch did not indicate any defect or break, nor did it give notice or warning of any deficiency. Under the undisputed evidence we are of the view that there was no negligence in failing to discover an alleged structural defect nor in failing to dismantle and subject the instrumentality to a microscopic inspection, there being no evidence of a custom of submitting such appliances to such a test. *Copeland v. Chicago, B. & Q. R. Co.*,

8 Cir., 293 F. 12; Canadian Northern R. Co. v. Senske, 8 Cir., 201 F. 637; Lake v. Shenango Furnace Co., 8 Cir., 160 F. 887; Waddell v. A. Guthrie & Co., 10 Cir., 45 F. 2d 977; Shankweiler v. Baltimore & O. R. Co., 6 Cir., 148 F. 195; Weireter v. Great Northern R. Co., 146 Minn. 350, 178 N. W. 877; Cederberg v. Minneapolis, St. P. & S. S. N. R. Co., 101 Minn. 100, 111 N. W. 953; McGivern, etc., v. Northern Pacific R. Co., 8 Cir., 132 F. 2d 213, 218. In McGivern v. Northern Pacific R. Co., *supra*, we said: 'These instrumentalities were in general use and met with general approval for the performance of this work. Two other carriers doing switching in Minnesota were shown to follow exactly the same practice. While custom or usage may not be controlling as fixing the standard of care it may be accepted where the custom or practice is not in itself negligent or in disregard of the safety of the employee.' In Canadian Northern R. Co. v. Senske, *supra*, the late Judge Walter H. Sanborn, speaking for this court, among other things said [201 F. 643]: 'The degree of care commonly exercised by other persons engaged in the same kind of business under similar circumstances presents such a standard. * * * the best test of actionable negligence and the true standard for the measurement of ordinary care is the degree of care which persons of ordinary intelligence and prudence, engaged in the same kind of business, commonly exercise under like circumstances. If the care exercised in the case rises to or above that standard, there is no actionable negligence.'

The evidence was to the effect that it was not the custom in inspecting appliances of this sort to dismantle them or subject them to microscopic examination. In the absence of any apparent defect or of

any failure to function there was nothing to suggest the necessity or propriety of dismantling this apparatus for the purpose of microscopic inspection. Certain instructions were issued by the manufacturer with reference to inspections. These contained no suggestion that a dismantling of the apparatus should be necessary in making inspection. The only reference to a general inspection found in the instructions reads as follows: 'The switch stand should be inspected frequently and it is recommended that the signal department and the track department make a joint inspection occasionally.' The evidence shows that this instruction was complied with by the defendants."

The affirmation of the judgment in favor of the plaintiff in *Lowden v. Hanson, supra*, was based upon the premise that the evidence showed that there was a simple test which the defendant could have made and discovered the defect in the instrumentality, but that that test was never made.

In this case there is no evidence or even a suggestion that the defendant failed to use all reasonable, available tests to detect defects in the clubs. There was nothing about the finished product indicating to the naked eye that the club was weak or otherwise defective.

The alleged weakness of the club would have been discovered by breaking and destroying it with resulting destruction of all of its usefulness. The law does not require such destruction.

The plaintiff's admission that he personally selected the club out of an open bin containing many other clubs, and that after he had examined it and found it to be a prac-

tically new and satisfactory club with no visible defects, is cogent evidence that the club had been previously and properly inspected by the defendant. The defendant's eyes could be no better than those of the plaintiff in so far as visible inspection was concerned.

The plaintiff, for all practical purposes, although not realizing that he was doing so, tested the strength and the quality of the club on approximately thirty different occasions [Tr. p. 58] shortly prior to the accident by using it to set up and tie down brakes. These tests, made by the plaintiff, disclosed no weakness or defect in the club. It is impossible to conceive of any other more searching or appropriate test of the club which could or should have been made by the defendant.

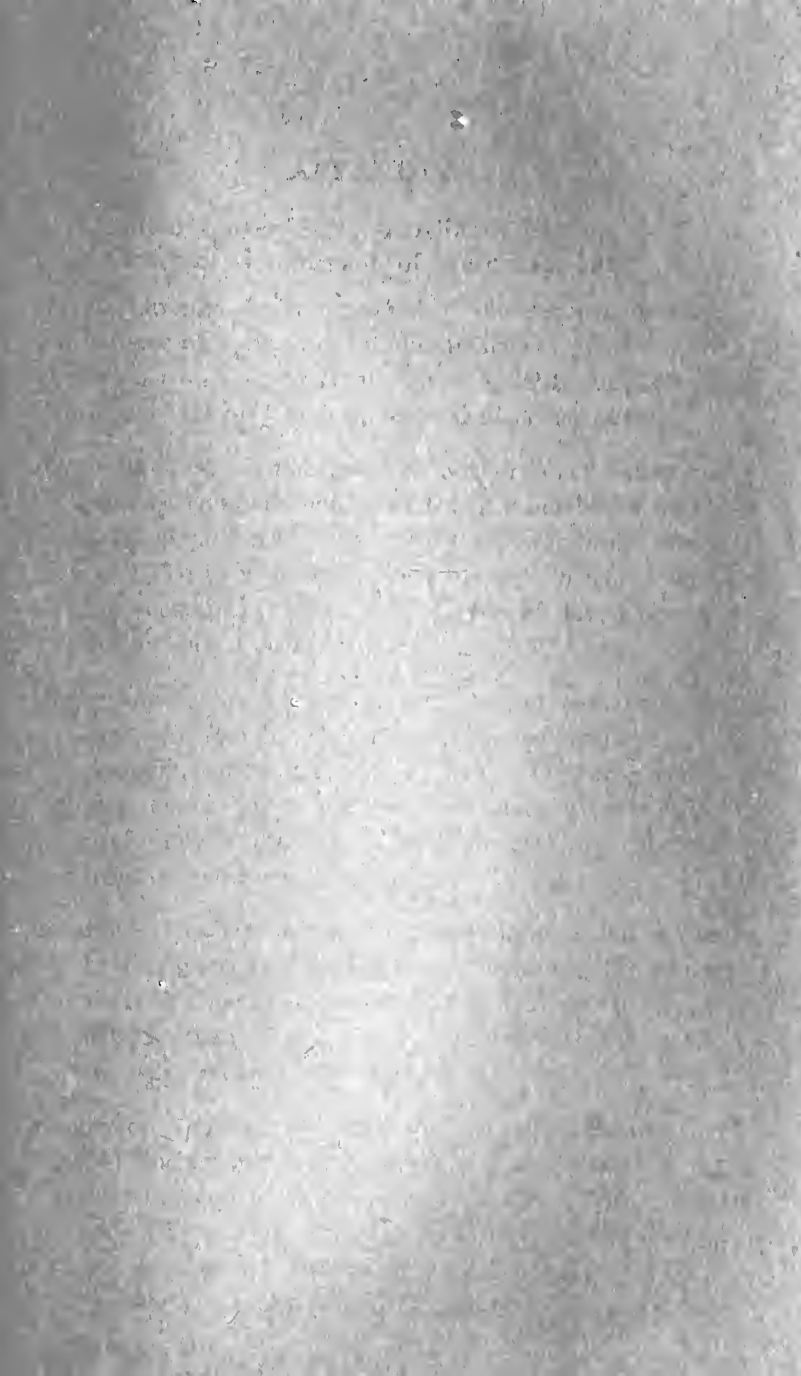
Conclusion.

It is respectfully submitted that in the respects above assigned, the trial court committed prejudicial error, and that the judgment should be set aside and reversed.

C. W. CORNELL,
O. O. COLLINS,
JOHN R. ALLPORT,

Attorneys for Appellant, Southern Pacific Company.







APPENDIX.

United States Safety-Appliance Standards Order of Commission of March 13, 1911.

It Is Ordered, That the number, dimensions, location, and manner of application of the appliances provided for by section two of the Act of April 14, 1910, and section four of the Act of March 2, 1893, shall be as follows:

HAND BRAKES: Number—Each box or other house car shall be equipped with an efficient hand brake which shall operate in harmony with the power brake thereon. The hand brake may be of any efficient design, but must provide the same degree of safety as the design shown on Plate A.

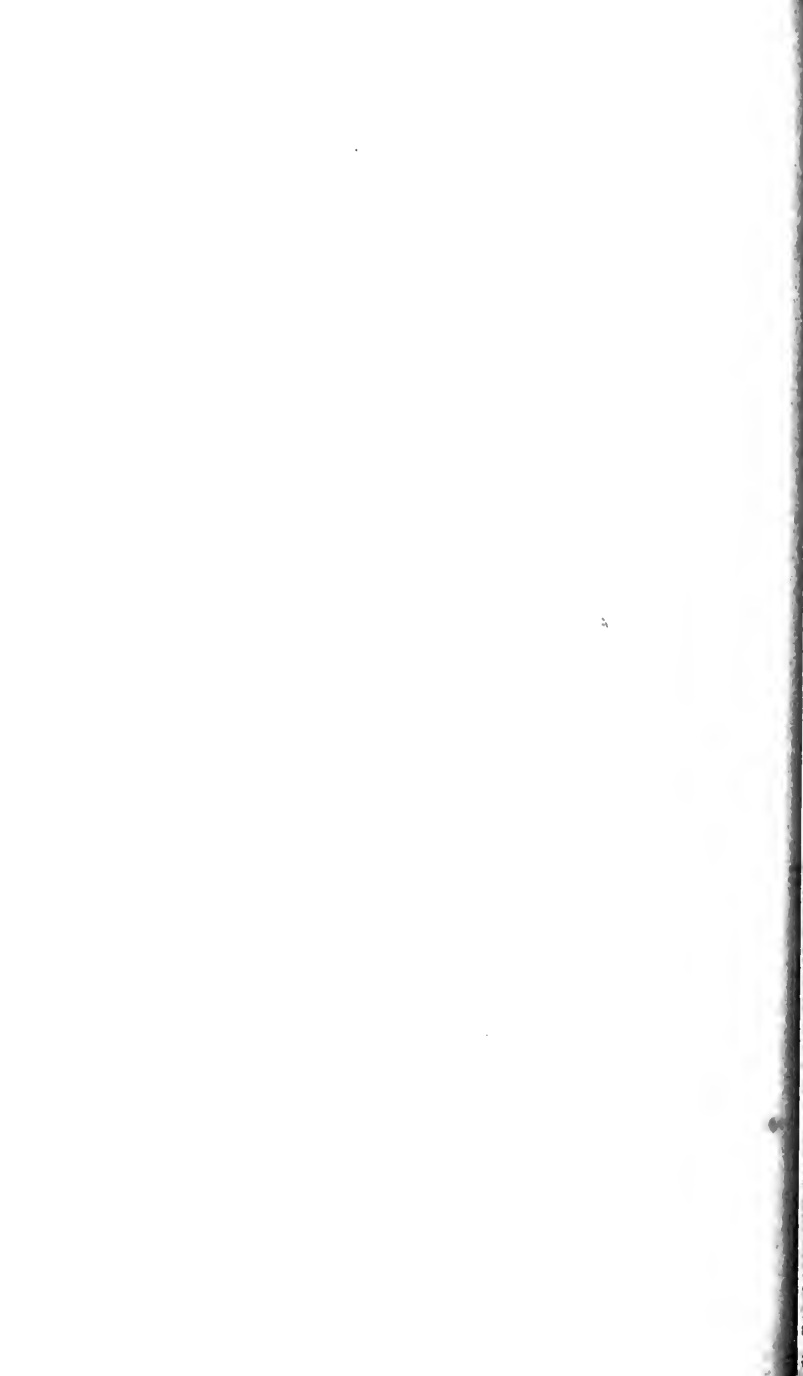
Dimensions—The brake shaft shall be not less than one and one-fourth ($1\frac{1}{4}$) inches in diameter, of wrought iron or steel without weld. The brake wheel may be flat or dished, not less than fifteen (15), preferably (16), inches in diameter, of malleable iron, wrought iron or steel.

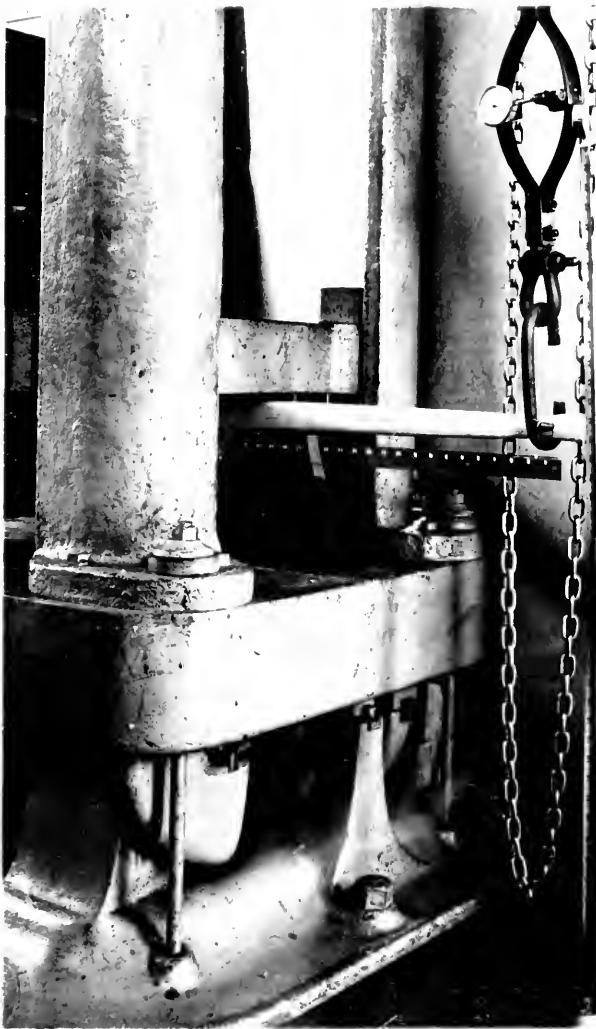
Location—The hand brake shall be so located that it can be safely operated while car is in motion. The brake shaft shall be located on end of car, to the left of and not less than seventeen (17) nor more than twenty-two (22) inches from center.

Manner of Application—There shall be not less than four (4) inches clearance around rim of brake wheel. Outside edge of brake wheel shall be not less than four (4) inches from a vertical plane parallel with end of car and passing through the inside face of knuckle when closed with coupler horn against the

buffer block or end sill. Top brake shaft support shall be fastened with not less than one-half ($1/2$) inch bolts or rivets. (See Plate A.) A brake shaft step shall support the lower end of brake shaft. A brake shaft step which will permit the brake chain to drop under the brake shaft shall not be used. U-shaped form of brake shaft step is preferred. (See Plate A.) Brake shaft shall be arranged with a square fit at its upper end to secure the hand brake wheel; said square fit shall be not less than seven-eighths ($7/8$) of an inch square. Square fit taper; nominally two (2) in twelve (12) inches. (See Plate A.) Brake chain shall be of not less than three-eighths ($3/8$), preferably seven-sixteenths ($7/16$) inch, wrought iron or steel, with a link on the brake rod end of not less than seven-sixteenths ($7/16$), preferably one-half ($1/2$), inches wrought iron or steel, and shall be secured to brake shaft drum by not less than one-half ($1/2$) inch hexagon or square headed bolt. Nut on said bolt shall be secured by riveting end of bolt over nut. (See Plate A.) Lower end of brake shaft shall be provided with a trunnion of not less than three-fourths ($3/4$), preferably one (1), inch in diameter extending through brake shaft step and held in operating position by a suitable cotter or ring. (See Plate A.) Brake shaft drum shall be not less than one and one-half ($1\ 1/2$) inches in diameter. (See Plate A.) Brake ratchet wheel shall be secured to brake shaft by a key or square fit, said square fit shall be not less than one and five-sixteenths ($1\ 5/16$) inches square. When ratchet wheel with square fit is used provision shall be made to prevent ratchet-wheel from rising on shaft to disengage brake pawl. (See Plate A.)

Brake ratchet-wheel shall be not less than five and one-fourth ($5\frac{1}{4}$), preferably five and one-half ($5\frac{1}{2}$), inches in diameter and shall have not less than fourteen (14), preferably sixteen (16), teeth. (See Plate A.) If brake ratchet-wheel is more than thirty-six (36) inches from brake wheel, a brake shaft support shall be provided to support this extended upper portion of brake shaft; said brake shaft support shall be fastened with not less than one-half ($\frac{1}{2}$) inch bolts or rivets. The brake pawl shall be pivoted upon a bolt or rivet not less than five-eighths ($\frac{5}{8}$) of an inch in diameter, or upon a trunnion secured by not less than one-half ($\frac{1}{2}$) inch bolt or rivet, and there shall be a rigid metal connection between brake shaft and pivot of pawl. Brake wheel shall be held in position on brake shaft by a nut on a treaded extended end of brake shaft; said threaded portion shall be not less than three-fourths ($\frac{3}{4}$) of an inch in diameter; said nut shall be secured by riveting over or by the use of a lock nut or suitable cotter. Brake wheel shall be arranged with a square fit for brake shaft in hub of said wheel; taper of said fit, nominally two (2) in twelve (12) inches.





h. o. 4-1
1/2 inch ym
test of test.
ready to be pr

424-1





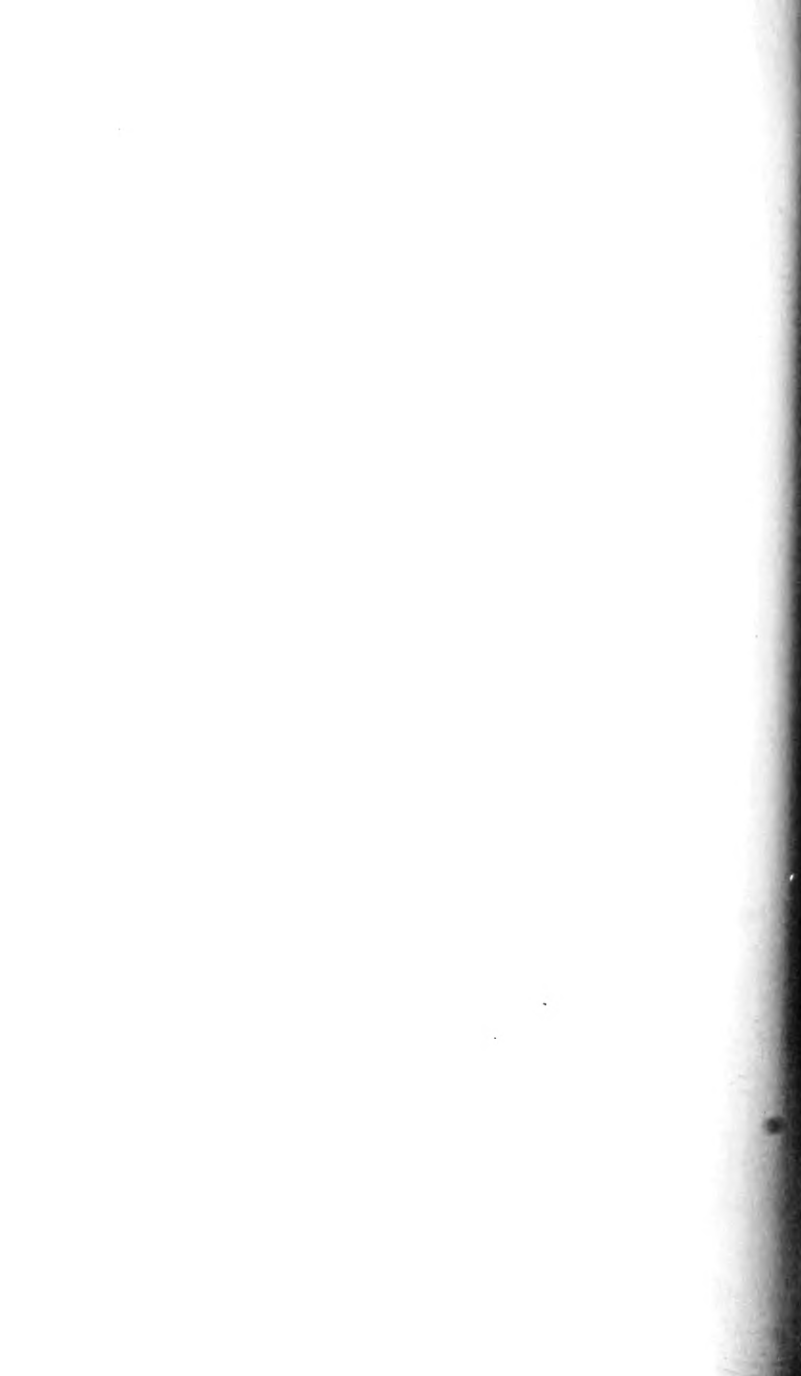
Lab. No. 401-
Toss up. Both
applying load
club.

424-B





4244



No. 11,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY
(a corporation),

vs.

WILLIAM K. CARSON,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

HILDEBRAND, BILLS & McLEOD,
D. W. BROBST,

1212 Broadway, Oakland 12, California,

Attorneys for Appellee.

FILED

APR 20 1935

PAUL P. CHRISTIAN
CLERK



Subject Index

	Page
Statement of the case	1
Facts	3
The basis of plaintiff's case	5
Argument	5
A. The court did not err by instructing the jury concern- ing the Safety Appliance Act	5
B. There would be no error even if the evidence did not support the giving of the instruction specified.....	12
C. Evidence sufficient to sustain the verdict	16
Conclusion	23

Table of Authorities Cited

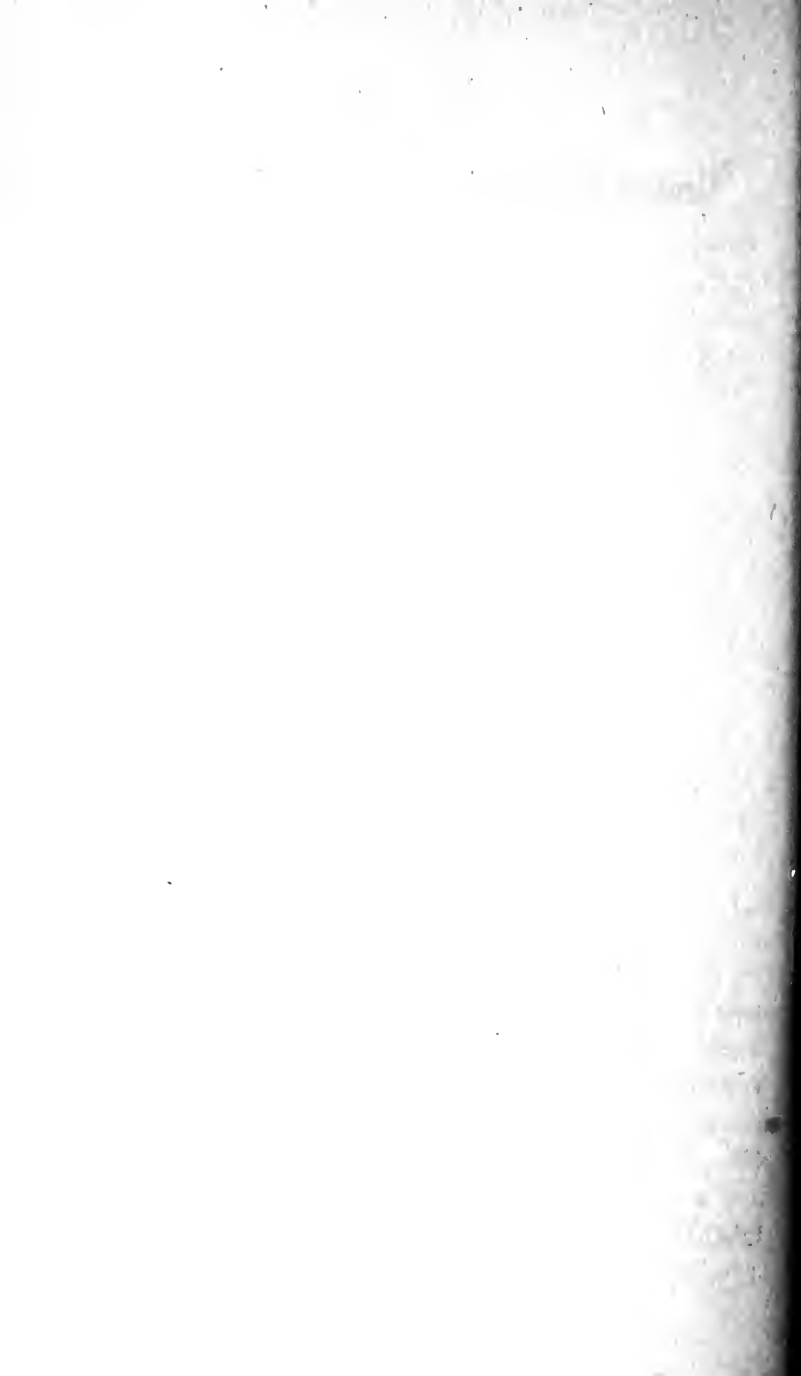
Cases	Pages
Edington v. S. P. Co., 12 C. A. (2d) 200.....	10, 12
Henwood v. Neal, 198 S. W. (2d) 125.....	2
King v. Schumacher, 32 Cal. App. (2d) 172.....	15
Lavender v. Kurn, 326 U. S. 713, 66 S. Ct. 232, 90 L. Ed. 421	16
Lilly v. Grand Trunk Western R. Co., 317 U. S. 481, 87 L. Ed. 411	11
Lowden v. Hanson, 134 Fed. (2d) 348	19, 23
Pitt v. Pennsylvania R. Co., 66 Fed. Sup. 443	18, 20, 23

Statutes

Federal Boiler Inspection Act, 45 U.S.C.A. 23.....	9
Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq..	1, 12, 16
Safety Appliance Act, 45 U.S.C.A. 11 et seq.	2, 6, 10, 11, 12

Texts

29 Marquette Law Review (Feb., 1946) 73	2
---	---



No. 11,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellant,

vs.

WILLIAM K. CARSON,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This action was instituted by the appellee to recover damages for personal injuries which he sustained while working as a brakeman for the appellant. He was injured when a brake club that he was using to set a handbrake on a tank car broke, and caused him to be thrown against the end of the car. The action was filed pursuant to the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq. A verdict was returned by the jury in favor of the appellee and judgment was entered in accordance with the verdict. Thereafter the appellant filed a motion for a new trial which was heard and denied by the trial Court.

The appellant has made three specifications of error but has combined two of them in its argument so just two are presented; the first specification is that the trial court erroneously instructed the jury with reference to the application of the Safety Appliance Act, 45 U.S.C.A. 11, et seq.; the second specification being that the evidence was insufficient to support the verdict.

The facts as set out by the appellant contain not only evidence introduced by the appellee but also conflicting and contrary evidence introduced by the appellant. This violates the established rule that Appellate Courts will accept the evidence offered by the prevailing party as true, together with all reasonable inferences to be drawn therefrom in disregard of any adverse showing made by the appellant.

“If, disregarding all adverse evidence and giving credit to all evidence favorable to him and indulging in every legitimate conclusion favorable to him which may be drawn from the facts proved, it supports the verdict, the verdict must be sustained.”

Henwood v. Neal, 198 S. W. (2d) 125;

See also 29 Marquette Law Review (Feb., 1946) 73.

With the above rule in mind appellee here states the evidence with all inferences reasonable drawn favorable to appellee.

FACTS.

Hereafter the appellee will be designated as "plaintiff" and the appellant will be designated as "defendant."

The plaintiff was a yardman who had worked for the defendant for a period of time a little in excess of two years (T. R., p. 41). He was injured in the defendant's North Yard at Tucson, Arizona, in the morning of February 2, 1947. (T. R., p. 41.) Plaintiff was engaged in switching a cut of cars, which consisted of a box car and two tank cars. (T. R., pp. 41, 42.) It was plaintiff's duty to ride this cut of cars and stop it or "tie" it down, in the clear of the switch points. (T. R., p. 42.) He was on one of the tank cars which was equipped with what is known as a staff brake, and he was to wind up this brake so that the cars would be held and stopped on the track in the clear of the switch point. (T. R., p. 42.)

Although this type of brake is called a hand brake it was necessary to use a brake club to set the brake. (T. R., p. 42.) The cars could not be held by setting the brake by hand. (T. R., pp. 46-47.)

As plaintiff attempted to "tie" down the cars using his brake club in the spokes of the wheels on the hand brake (T. R., p. 62) the brake club broke and plaintiff was thrown against the end of the tank car upon which he was riding. (T. R., p. 47.)

The brake club is a piece of hickory about thirty-two inches long, round at one end and tapered at the other. (T. R., p. 47.) Plaintiff had obtained the

brake club from the brake club can located in front of the defendant's yard office. (T. R., p. 47.) At the time that the brake club broke, plaintiff was using normal force in attempting to set the brake. (T. R., p. 52.) The club was not new. It had been used and replaced in the can by the defendant's supply man. (T. R., p. 53.)

The brake clubs are placed in the can in front of defendant's yard office by the supply man of the defendant. (T. R., p. 72.) The brake club is a necessary part of the equipment to set the hand brakes. (T. R., pp. 71-72.) The hand brake of the type plaintiff was operating will not operate efficiently without a brake club. (T. R., p. 76.)

The club used by plaintiff was too light to sustain the strain put on it and when normal pressure was placed upon the club it broke squarely in two. (T. R., pp. 84-85.)

The brake clubs are purchased by the defendant from a reputable dealer (T. R., p. 141) and one out of every twenty in a shipment obtained by the defendant is tested (T. R., p. 131) and if the one club passes the test the other nineteen are sent out for general use. (T. R., p. 140.) The clubs are tested and considered safe by the defendant railroad company if they withstand five hundred pounds minimum pressure. (T. R., pp. 132-133.) The company has set a five hundred pound pressure as a minimum without knowing how much pressure is exerted by the men who use them in stopping and "tying" down freight

cars. (T. R., p. 139.) There is no other test made of the brake clubs. If they are used and re-used the defendant railroad company does nothing to check what use the clubs have been put to nor what strains have been placed upon them (T. R., pp. 113, 139) even though a pressure of five hundred pounds will destroy their efficiency. (T. R., p. 133.)

THE BASIS OF PLAINTIFF'S CASE.

The plaintiff tried this action upon the theory that the defendant failed to exercise ordinary care to supply plaintiff with a proper, adequate and efficient appliance with which to perform his required duties. It further developed from the evidence as introduced at the trial that the handbrake on the tank car in question was not operating efficiently because it was necessary to use a brake club, which was supplied by the defendant, to set the brake. The record contains ample evidentiary support for the verdict of the jury.

ARGUMENT.

A. THE COURT DID NOT ERR BY INSTRUCTING THE JURY CONCERNING THE SAFETY APPLIANCE ACT.

The trial Court did not commit error by giving the following instruction:

“If you find from a preponderance of the evidence that the handbrake on the tank car in question would not operate efficiently without the use

of a brake club, and if you find further from a preponderance of the evidence that the brake club in question was a necessary part of the handbrake on the tank car, then and in that event only, you may apply the following instructions which I will give you.

Where plaintiff's contributory negligence and defendant's violation of a provision of the Safety Appliance Act are concurring proximate causes, the Federal Employers' Liability Act requires plaintiff's contributory negligence, if any, be disregarded."

This instruction did not state that the defendant would be liable if the brake club in question broke. All that this instruction told the jury was that if there was a violation of the provisions of the Safety Appliance Act, (45 U.S.C.A. 11, et seq.), then contributory negligence, if any, upon the part of the plaintiff which was a concurring, proximate cause of injury to the plaintiff was to be disregarded. In other words, plaintiff did not at any time rely wholly upon a violation of the provisions of the Safety Appliance Act (45 U.S.C.A. 11, et seq.) as a basis for a recovery, although, as will be pointed out later, under the evidence the plaintiff was entitled to the full benefits of the Safety Appliance Act.

The uncontradicted evidence shows that the brake in question was a hand brake but that it would not operate efficiently by hand.

"Q. (Of Mr. Daniel J. Byrne, Jr.) Now all these brakes are hand brakes?

A. Yes, sir.

Q. Do you use any other kind of equipment? Do you have any other kind of equipment to set them?

A. Yes, a club.

Q. Where did you get the clubs?

A. We generally pick them up at a place where they have them for us.

Q. Just speak up.

A. They generally have them in a can or on an engine where we can pick them up.

Q. Who puts them in the can there?

A. The supply man generally fills up the can.

Q. And he is the supply man for the Southern Pacific Company?

A. Yes, sir.

Q. Is this the type of club that is supplied to you?

A. (Examining club.) Yes, sir.

* * * * *

Q. Now, Mr. Byrne, is it possible to set those brakes by a single use of the hands without the aid of a club?

A. No, sir.

Q. You have to use the club to set that type of brake?

A. Yes, sir."

(T. R., pp. 71-72.)

The defendant recognized that the staff type of brake would not operate properly without a brake club and in consequence the defendant furnished this additional equipment for the men to use in order that the brakes might be efficiently operated.

"Q. (Of Mr. Voleny Barnett.) Now what type of brake was on this—you went over to the oil car, did you, or the tank car?

A. That is true.

Q. What type of brake did it have on it?

A. Staff brake.

Q. Is that a hand operated brake?

A. Well, they are commonly called hand brakes.

Q. Can you set them properly by hand?

A. Not in the Tucson yard.

Q. What are you required to use to set them?

A. A club.

* * * * *

Q. Can the brake be used efficiently without the use of a brake club?

A. Well, not in the Tucson yard, they cannot.

Q. In other words, the brake will not operate efficiently unless a brake club is used, is that correct?

A. Yes."

(T. R., pp. 75-76.)

"Q. (Of plaintiff.) Where did you say you got the brake club?

A. From the front of the yard office, the brake club can."

(T. R., p. 47.)

"Q. (Of Mr. Daniel J. Byrne, Jr.) Where did you get the clubs?

A. We generally pick them up at a place where they have them for us.

Q. Just speak up.

A. They generally have them in a can or on an engine where we can pick them up.

Q. Who puts them in the can there?

A. The supply man generally fills up the can.

Q. And he is the supply man for the Southern Pacific Company?

A. Yes, sir.

Q. Is this the type of club that is supplied to you?

A. (Examining club.) Yes, sir."

(T. R., pp. 71-72.)

The evidence was uncontradicted that the brake club was a necessary part of the brake equipment, and the brake club was supplied to the plaintiff by the defendant for the purpose of making the so called hand brake operate efficiently. Under like circumstances where a placard board on an auxiliary tank car was customarily used as a handhold it was held that the placard board was one of the appurtenances of a locomotive so that the provisions of the Federal Safety Appliance Act applied, to wit, the Federal Boiler Inspection Act, 45 U.S.C.A. 23.

"In this regard the Employers' Liability Act provides and the jury was instructed to the effect that a common carrier engaged in interstate commerce is liable in damages for the injury to or death of its employees, 'resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, etc.'; also that in any action for damages brought under the authority of said act the employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier 'of any statute enacted for the safety of employees contributed to the injury or death of such employee.' The Boiler Inspection Act provides and the jury

was instructed to the effect that 'It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, and the same may be employed in the active service of such carrier without unnecessary peril to life or limb. * * *' And it has been held, and the jury in the present case was instructed, that the phrase 'In the service to which the same are put', *as contained in section 2 of the Boiler Inspection Act, must be taken to mean the service for which the appliance is designed, or to which it is put with the employer's knowledge and acquiescence.* (Italics ours.) (Chicago, B. & Q. Ry. Co. v. Murray, 40 Wyo. 324 (277 Pac. 703) citing many authorities.)''

Edgington v. S. P. Co., 12 C. A. (2d) 200.

The test laid down by the *Edgington* case is how the appliance was used with the knowledge and consent of the employer. The brake club here was an appliance used with the knowledge and consent of the employer, and it was supplied to the employee for the purpose of making the brake work.

The gist of the defendant's argument in this action is that there was no violation of the Safety Appliance Act because that Act does not mention a brake club as being part of the braking equipment. Putting it another way, the argument is that because the brake itself had no mechanical or structural defects there was no violation of the Safety Appliance Act and

hence the instruction which was given was not proper under the evidence.

Defendant argues that even though the evidence is uncontradicted that the hand brake could not be operated efficiently without the use of the brake club.

The recent decisions of the United States Supreme Court are opposed to such an argument. They hold that the Safety Appliance Act is broader in its scope and liability can be based upon that Act without proof of a mechanical or structural defect.

“From various cases denying recovery under the act respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment ‘in proper condition and safe to operate * * * without unnecessary peril to life or limb.’ Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation.”

Lilly v. Grand Trunk Western R. Co., 317
U. S. 481, 87 L. Ed. 411.

Clearly under the above authorities plaintiff was entitled not only to the instruction which was given but to an instruction that violation of the Safety Appliance Act would place an absolute liability upon the defendant. The evidence is uncontradicted that the brake club was recognized as a necessary part of the braking equipment of the type of brake involved in this accident and that in recognition of this fact the defendant actually supplied the men with this necessary appurtenance.

B. THERE WOULD BE NO ERROR EVEN IF THE EVIDENCE DID NOT SUPPORT THE GIVING OF THE INSTRUCTION SPECIFIED.

Even if the instruction was not properly given by the Court, the verdict that was returned was general and there is ample evidence in the record to support a recovery under the general provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq.

Where an action is based on several statutes and a general verdict is returned, such verdict will be sustained if it appears from the evidence that any one of the statutes was violated.

“* * * And it is well settled that where an action is based on the alleged violation of civil statutes, and a general verdict is rendered in favor of plaintiff, such verdict will be sustained if it appears that any one of said statutes was violated. (Walton v. S. P. Co., 8 Cal. App. (2) 290; 48 P. (2) 108.)”

Edgington v. S. P. Co., 12 Cal. App. (2d) 200.

This is the rule even though the jury may have been erroneously instructed on one of the causes of action unsupported by the evidence.

“As to the other charge, that the ditcher was negligently maintained, the evidence shows that the *axle* transmitting power to one set of wheels was *broken*, and it is a fair inference from the testimony that due to this condition the movement forward and backward on the rails would not be as readily subject to control as would otherwise have been the case. However, *the record clearly shows that notwithstanding this, the movement forward was stopped immediately upon the discovery by the engineer of the fact of the accident.* It would appear, therefore, as defendants claim, that the evidence does not reasonably support the conclusion that the accident was caused or aggravated by said defect or might have been avoided had it not existed. We are unable to agree with defendants, however, that failure of plaintiff to establish liability under this latter charge of negligence serves as ground for reversal of the judgment. As said by this court in affirming the judgment in *Walton v. Southern Pacific Co.*, 8 Cal. App. (2d) 290 (48 Pac. (2d) 108), involving a similar situation in an action founded also on federal statutes: ‘It is settled that *where suit is brought upon two different theories, if there is evidence to sustain either of them and the verdict of the jury be a general one, the general verdict will stand.* * * *’ (Italics ours.)

“Defendants (in their supplemental points and authorities) concede that the *Walton* case ‘is squarely against’ the position they have taken on

this point, but they contend that the portion of the decision above quoted 'is clearly wrong on principle;' and in a later brief they cite cases which they claim support their view. We have found nothing in any of those cases nor in the arguments advanced by defendants in connection therewith to warrant the conclusion that the doctrine quoted from the Walton case is not the settled law of this state, in this class of cases; and the authorities are abundant showing that it is. In California Jurisprudence (Vol. 19, p. 675) the law upon the subject is summarized as follows: 'A statement in a complaint of several distinct acts of negligence does not render the pleading subject to either a general or a special demurrer. In such a case a plaintiff may rely upon any one of the alleged acts of negligence as the proximate cause of his injury or upon all of said acts as operating together or concurrently in causing the damage. Accordingly, where several acts are pleaded, a general verdict for the plaintiff will not be set aside for want of evidence to support it if there is sufficient evidence of negligence to justify it upon one of the issues. Where each of the acts pleaded constitutes a separate cause of action, they should be separately stated, but a failure to do this merely renders a complaint demurrable upon that ground; it does not render the complaint subject to a general demurrer, or to a special demurrer for uncertainty.' Furthermore, the doctrine set forth in the Walton case was restated and again applied by this court in the case of Edgington v. Southern Pacific Co., 12 Cal. App. (2d) 200 (55 Pac. (2d) 553), which was also based on federal stat-

utes; and numerous cases may be found not involving federal statutes but based nevertheless on two or more issues of fact, wherein the same doctrine has been declared and applied. Among them are *Sessions v. Pacific Imp. Co.*, 57 Cal. App. 1 (206 Pac. 653), and *Merrill v. Kohlberg*, 29 Cal. App. 382 (155 Pac. 824) cited in the Walton case; also *Worley v. Spreckels Bros. Com. Co.*, 163 Cal. 60 (124 Pac. 697); *Criss v. Angelus Hospital Assn.*, 13 Cal. App. (2d) 412 (56 Pac. (2d) 1274); *Hume v. Fresno Irrigation Dist.*, 21 Cal. App. (2d) 348 (69 Pac. (2d) 483). *And it has been definitely held that said doctrine is controlling, notwithstanding reversible error may have been committed by the trial court in dealing with the unsupported issue* (*Hume v. Fresno Irr. Dist.*, *Supra*), *one of the cases so holding being where the trial court erroneously refused to instruct the jury that there was no evidence to sustain such issue* (*Criss v. Angelus Hospital Assn.*, *supra*). (Italics ours.) Moreover, an examination of the various cases discloses that in applying said doctrine the courts have not discriminated between cases like the present one wherein the complaint sets forth two (or more) acts of negligence in one count (*Verdelli v. Gray's Harbor etc. Co.*, 115 Cal. 517 (47 Pac. 367, 778); *Criss v. Angelus Hospital Assn.*, *supra*; *Camozzi v. Colusa Sandstone Co.*, 26 Cal. App. 74 (147 Pac. 107)), and those like the Walton case, wherein each negligent act is made the subject of a separate count (*Sessions v. Pacific Imp. Co.*, *supra*; *Merrill v. Kohlberg*, *supra*). It has been applied with equal force to both."

King v. Schumacher, 32 Cal. App. (2d) 172.

There was ample evidence to support a recovery under the provisions of the Federal Employers' Liability Act which requires that negligence on the part of the defendant be established.

C. EVIDENCE SUFFICIENT TO SUSTAIN THE VERDICT.

There was ample evidentiary basis for the jury's verdict. All that the Appellate Court should be concerned with is whether there is evidence which is contradicted or uncontradicted from which a reasonable inference could be drawn that would support plaintiff's right to a recovery.

“Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.”

Lavender v. Kurn, 326 U. S. 713, 66 S. Ct. 232,
90 L. Ed. 421.

The defendant was under a continuing duty to exercise ordinary care to see that instruments and appliances furnished for use of the plaintiff were in a reasonably safe condition and it was the duty of the defendant to have the brake club in question inspected and tested from time to time.

“In addition to this, the simple tool doctrine no longer applies to actions brought under the Employers’ Liability Act. In the case of *Jacob v. City of New York*, 315 U. S. 752, 62 S. Ct. 854, 856, 86 L. Ed. 1166, the Supreme Court said: ‘* * * the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application, suggests that it should not apply to cases arising under legislation, * * * designed to enlarge in some measure the rights and remedies of injured employees.’

In the case of *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 446, 87 L. Ed. 610, 143 A. L. R. 967, the Supreme Court said:

‘We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1939 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent of non-negligence. We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to non-negligence.’ As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U.S.C.A. 1, et seq. ‘Unless great care be taken, the servant’s rights will be sacrificed by simply charging him with assumption of the risk under another

name;’ and no such result can be permitted here. * * * Other complications arose from the introduction of * * * ‘simple tool,’ and * * * concepts into the assumption doctrine. In the disposition of cases the question of a plaintiff’s assumption of risk has frequently been treated simply as another way of appraising defendant’s negligence, as was done by the Court below in the instant case.

‘It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers’ Liability Act, releasing the employee from the burden of assumption of risk by whatever name it is called. The result is an Act which requires cases tried under the Federal Act to be handled as though no doctrine of assumption of risk had ever existed.’ (Emphasis added.) Cf. *Griswold v. Gardner*, 7 Cir., 155 F. (2d) 333.

I conclude that the plaintiff suffered his injuries because the defendant was negligent in not exercising ordinary care to supply the plaintiff with a proper, adequate, efficient and safe tool, reasonably suitable for the plaintiff’s use in the service he was directed to perform by the defendant.”

Pitt v. Pennsylvania R. Co., 66 Fed. Sup. 443 at 446.

“As employers they were under the duty of exercising ordinary care in furnishing the plaintiff with reasonably safe appliances with which to work and a reasonably safe place in which to perform his services. But this was not the limit of their duty toward the plaintiff. They were

under the continuing duty of exercising ordinary care to see that the instrumentalities and appliances furnished for the use of plaintiff, as well as the premises where he was required to work, were maintained in a reasonably safe condition. *Phillips Petroleum Co. v. Manning*, 8 Cir., 81 Fed. (2d) 849. It was, therefore, their duty to have the appliances so furnished inspected from time to time."

Lowden v. Hanson, 134 Fed. (2d) 348.

The brake club in question broke squarely in two. There was no evidence that this club had ever been inspected. The only inspection given any brake club was by selecting just one out of twenty new clubs and subjecting that one club to a minimum test of five hundred pounds, then placing the nineteen remaining clubs in use without any further test whatsoever.

It must be kept clearly in mind that a minimum of five hundred pounds was set without the company knowing what pressure the men who used the clubs asserted on them while setting or "tying" down brakes.

"Q. (Of Mr. Graham, defendant's expert witness.) How much pressure does the ordinary brakeman exert on a club such as that?

A. That is something that has never been determined.

Q. You have never determined that?

A. No, sir.

Q. Yet you say that a safe test would be 500 pounds?

A. That is what we have taken for granted."

(T. R., p. 138.)

The jury could have found that the original test of these brake clubs was inadequate, even though the clubs were purchased from a reputable concern. It is to be noted particularly that there was no evidence to show that these clubs when purchased from the manufacturer were guaranteed.

The club that was used by the plaintiff which broke was not a new club.

“Q. (Of plaintiff.) Now when you selected this club from the can, state whether or not it was a used club or a new club.

A. It was a used club, it was almost new. I figured it was all right.

Q. But it had been used?

A. Yes, sir.”

(T. R., p. 53.)

In other words, the club selected by the plaintiff was one which had been used by other trainmen and was placed in the receptacle for other clubs to be used by other brakemen without any test to determine whether or not its efficiency had been destroyed by previous use or whether it was in a condition due to any other cause so that it could be used with safety by the men required to use it, and as pointed out *supra*, the law places a continuing duty upon the defendant under such circumstances to give inspections and to see that tools supplied to the workmen are safe to be used for the purpose for which they are supplied.

See *Pitt v. Pennsylvania Ry.*, *supra*.

There was only the one test made when the clubs were first supplied to the defendant.

“Q. (Of Mr. Graham.) As far as any test is concerned at the actual scene where the club is used and reused, you know nothing about those tests?

A. That is right.

Q. And these clubs are sent out as being safe when you take one out of 20 and if it passes inspection the other 19 go out to be used?

A. That is universally accepted with all inspection.

Q. Whether or not they are going to exert more than 500 pounds on each club, you don't know that?

A. No, sir.”

(T. R., pp. 139-140.)

“Q. (Of Mr. Barnett.) As far as any test being given by the supply man who puts them out, state whether or not any is given.

* * * * *

Did you see or observe any tests being made by any of the supply men at any time while you were working out there at the Tucson yards?

A. I have not.”

(T. R., pp. 112-113.)

That the club was not proper for the purpose for which it was supplied plaintiff by the defendant was amply proven by the fact that when it was used in the ordinary manner, it broke squarely in two.

“Q. (Of plaintiff.) Now getting back to the time of the accident, Mr. Carson, just describe the force that you were using at the time the club broke.

A. I was just using normal force, the same as I had used all morning, or that I used all the time.

Q. Anything unusual that you were doing?

A. No, sir."

(T. R., p. 52.)

Plaintiff's expert, William D. Jacobs, testified, and this evidence was not contradicted by any of defendant's witnesses, that by lifting and feeling the club an experienced man could have determined that it was too light for the purpose for which it was supplied to the plaintiff and that if ordinary pressure was exerted it would break.

"Q. Now, by picking that club up, can you tell whether or not it is strong enough to use in the ordinary braking operations?

* * * * *

A. Well, this club is too light to be of a good grade of wood that will sustain the strain that is put on a brake club when it is applied with any degree of force."

(T. R., p. 83.)

"Q. In other words, you are just picking up a club and feeling it in your hand and saying it doesn't feel heavy enough to me?

A. I say because I have seen brakes like that being broken before and breaking them myself before.

Q. You just simply picked it up and after holding it in your hand you say you don't think it is quite heavy enough?

A. That is right, I don't think it is heavy enough.

Q. And you say that you also base your opinion on the fact that you have seen other clubs that are broken?

A. Many of them; yes, sir.

Q. And you have seen all sizes broken?

A. I have."

(T. R., p. 84.)

The jury could have found from this evidence that an experienced supply man or one accustomed to the use of clubs such as plaintiff's expert witness could have discovered the insufficiency of this club by a simple inspection and the law holds, as previously pointed out, that the defendant was under a continuing duty to inspect appliances supplied to their employees.

See *Pitt v. Pennsylvania Ry.*, supra;
Lowden v. Hanson, supra.

CONCLUSION.

It is respectfully submitted that there was no error committed by the trial Court in the giving of the instruction specified as error and that there is ample evidentiary basis for the verdict of the jury and plaintiff respectfully urges that the judgment be affirmed.

Dated, Oakland, California,
April 24, 1948.

Respectfully submitted,
HILDEBRAND, BILLS & McLEOD,
By D. W. BROBST,
Attorneys for Appellee.



No. 11773.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

WILLIAM K. CARSON,
Appellee.

APPELLANT'S REPLY BRIEF.

FILED

MAY - 8 1948

PAUL P. O'BRIEN

C. W. CORNELL,
O. O. COLLINS,
JOHN R. ALLPORT,
670 Pacific Electric Building, Los Angeles 14,
Attorneys for Appellant Southern Pacific Company.



TOPICAL INDEX

	PAGE
Reply to appellee's Point "A".....	1
Reply to appellee's Point "B".....	4
Reply to appellee's Point "C".....	6
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES	PAGE
Atchison, Topeka & Santa Fe Railway Company v. Scarlett, 300 U. S. 471, 81 L. Ed. 479.....	3
Christian v. Boston & M. R. R., 109 F. (2d) 103.....	5
Edgington v. Southern Pacific Company, 12 Cal. App. (2d) 200	2, 4
Honea v. City Dairy. Inc., 22 Cal. (2d) 614.....	6
Lilly v. Grand Trunk Western Railway Company, 317 U. S. 481, 87 L. Ed. 411.....	2
Schilling v. Delaware & H. R. Corporation, 114 F. (2d) 69.....	5
STATUTES	
Federal Boiler Inspection Act (45 U. S. C., Chap. 1, Sec. 23)....	2
Safety Appliance Act, Sec. 11.....	2, 3

No. 11773.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

WILLIAM K. CARSON,

Appellee.

APPELLANT'S REPLY BRIEF.

For the sake of consistency the Appellee will be designated as plaintiff and the Appellant as defendant throughout this reply brief.

Appellee's "A."

In defendant's opening brief the error of the Trial Court in failing to hold as a matter of law that a brake club was not a part of the hand brake within the meaning of the Safety Appliance Act was presented for consideration of this Court: The further error of the Trial Court in permitting the jury to speculate as to the applicability of the Safety Appliance Act under the facts of this case was set forth as additional grounds requiring reversal of the judgment entered herein.

A consideration of plaintiff's reply to these specifications of error fails to disclose any satisfactory legal basis for the Trial Court's action.

In support of plaintiff's contention that the brake club was a necessary part of the hand brake within the meaning of the Safety Appliance Act, plaintiff cites the cases of *Edgington v. Southern Pacific Company*, 12 Cal. App. (2d) 200, and *Lilly v. Grand Trunk Western Railway Company*, 317 U. S. 481, 87 L. Ed. 411, which cases construe provisions of the Federal Boiler Inspection Act, Title 45, Chapter 1, Section 23.

It is the position of defendant that cases construing the Boiler Inspection Act are in no way determinative of the questions presented here in view of the express provisions of that Act itself as distinguished from the Safety Appliance Act, which plaintiff contends is applicable to this case.

The Boiler Inspection Act provides as follows:

"It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all *parts and appurtenances thereof* are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, * * *." (Emphasis added.)

Section 11 of the Safety Appliance Act provides in part as follows:

"It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

It is readily apparent that the Boiler Inspection Act itself makes provision whereby "parts and appurtenances" not expressly mentioned therein may be construed as coming within the purview of the Act. There is no requirement of Section 11 that all "parts and appurtenances" of a car shall be included within its provisions, but only that each car shall be equipped with certain standardized appliances including efficient hand brakes.

The cases cited by plaintiff construe the provisions of the Boiler Inspection Act, which as noted above expressly includes "parts and appurtenances" of a locomotive, its boiler and tender. Plaintiff has not cited a single decision wherein the provisions of the Safety Appliance Act have been enlarged upon to include any equipment not expressly enumerated in the Act itself. This fact bears out defendant's contention that the provisions of the Safety Appliance Act itself leave no room for the courts to enlarge thereon by including in addition to the appliances expressly mentioned any additional equipment, since that Act does not contain the words "parts and appurtenances," and expressly enumerates the equipment covered by its provisions.

Argument similar to that made by plaintiff herein was made in *Atchison, Topka & Santa Fe Railway Company v. Scarlett*, 300 U. S. 471, 81 L. Ed. 479, cited in Appellant's Opening Brief, page 41, wherein an effort was made to enlarge upon the express provisions of the Safety Appliance Act, and wherein the Court held that the Act was not subject to such construction.

Appellee's "B."

Under point "B" of Appellee's brief, in an effort to justify the giving of a prejudicially erroneous instruction, counsel resort to the customary brief writing technique of saying that even though the instructions complained of may have been erroneous they were not prejudicial. In support of this proposition the *Edgington* case is cited to the effect that a general verdict may be supported where there is evidence showing a violation of at least one of several statutes under which the action is brought.

The principal of law announced in the *Edgington* decision is clear and undeniably sound when applied to the facts set forth therein. In that case there was evidence offered from which the jury could properly conclude that there was a violation of either the Federal Safety Appliance Act, the Federal Boiler Inspection Act, or the Federal Employers' Liability Act and there was no question of law as to the applicability of any of these statutes. Special verdicts of the jury indicated that it found there was no violation of the Safety Appliance Act, but that there was a violation of the Boiler Inspection Act. There was also evidence to support a finding that plaintiff's injury was the result of a violation of the Federal Employer's Liability Act, and hence the verdict of the jury was upheld.

In the case at bar it is contended that the Safety Appliance Act had no application as a matter of law and that there was no evidence to justify a verdict based thereon. There being no special verdict in the instant case whereby this court can say that the jury did not find for plaintiff based on a violation of the Safety Appliance Act, the rule of the *Edgington* case falls and this action is thus governed by the general rule that where two is-

sues of negligence are submitted to the jury a general verdict must fail unless there is evidence in support of both issues.

In *Christian v. Boston & M. R. R.*, 109 F. (2d) 103, 1940, an action was brought under the Federal Employers' Liability Act alleging two separate charges of negligence both of which were submitted to the jury over defendant's objection. The Circuit Court concluded there was no evidence to support the second charge although there was evidence justifying the submission of the first charge. In reversing a verdict rendered on behalf of plaintiff the Court said on page 105:

"The error requires reversal of the judgment. The verdict for the plaintiff was a general one. For all we know, the jury found its verdict on the claim for which there was no evidence. Where two issues of negligence are sent to the jury and the verdict for the plaintiff is general, the judgment must be reversed if there was no evidence in support of one of the issues. *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708; *New York, N. H. & H. R. Co. v. Murphy*, 2 Cir., 204 F. 420; *Erie R. Co. v. Gallagher*, 2 Cir., 255 F. 814."

In *Schilling v. Delaware & H. R. Corporation*, 114 F. (2d) 69, 1940, likewise brought under the Employers' Liability Act, the Circuit Court reversed a verdict for the plaintiff saying on page 72:

"As the case must be treated now as submitted upon the unproved issues of failure to warn the plaintiff of the impending movement of the car, and lack of time to cross the track as well as upon theories of recovery as to which submission was justified there must be a reversal since the verdict was

general and no one can tell whether or not the jury found for the plaintiff upon an issue unsupported by the evidence. *Christian v. Boston & Maine R. R.*, 2 Cir., 109 F. 2d 103.”

It follows from the foregoing that since the jury may well have found against defendant by an erroneous application of the Federal Safety Appliance Act the prejudicial error in submitting this question as a matter of fact under the instructions complained of becomes readily apparent.

Appellee's "C."

Under this point plaintiff argues that there was evidence in this record to justify the conclusion that defendant failed to use reasonable care in the furnishing of this brake club to its employee.

It is felt by defendant that this argument loses sight of the fact that in situations of this type the employer is not an insurer and that there are certain fundamental practical limitations involved in the locating of latent defects in instruments of this character. The practical aspects of this problem have been recognized by the Supreme Court of this state in the case of *Honea v. City Dairy, Inc.*, 22 Cal. (2d) 614, 1943, wherein plaintiff sued for personal injuries when a glass milk bottle “just broke” in her hand. It was therein claimed that defendant was negligent in failing to discover the defect in the bottle. In reversing a judgment rendered in favor of plaintiff the Court held that even though defendant had a duty of inspecting both old and new bottles it was not responsible for defects that could not be found by a *reasonable* and *practicable* inspection. The Court in render-

ing its decision quotes from the Supreme Court of Kentucky as follows:

“‘Unless we were prepared to hold defendant as an insurer, it is hard to see how else it could be held responsible without some showing that its opportunity to exercise care was in some measure proportionate to the duty imposed—without some showing that a more thorough inspection would have been effective. Plaintiff’s experts suggest various methods of testing bottles which might be applied, but it is not shown that these tests are commercially practicable or that they would have disclosed the complained-of defect * * *. We must measure the duty by ordinary standards and by consequences reasonably to be anticipated. Subject to these criteria, it is clear that the proof falls short of raising any inference of negligence.’”

This decision recognizes the practical limitations upon the discovery of defects and denies recovery even though it may be theoretically possible to invoke further tests.

As pointed out in pages 52-56 of defendant’s opening brief the brake club in question was purchased from a reputable manufacturer whose clubs were subjected to rigorous tests and specifications before being supplied to the railroad brakemen. The particular club in question, as selected by plaintiff, appeared “like new” and was without apparent defect. This club was used by plaintiff, without mishap, some 30-35 times before it broke and was obviously unavailable to defendant for further inspection during this time. Despite the foregoing, plaintiff requests this Court to, disregarding the practical aspects of the problem, permit the jury to infer negligence because the club broke in two and because William D. Jacobs said it appeared to him to be “too light.”

Defendant earnestly contends that for this Court to permit the jury to infer negligence from the testimony in this case would be to sanction a verdict based upon speculation and without foundation in fact contrary to our cherished and fundamental legal concepts.

Conclusion.

It is respectfully submitted that for the reasons herein stated plaintiff has failed in his attempt to answer the assignments of error presented in defendant's opening brief and that for the reasons set forth therein the judgment entered in this case should be reversed and set aside.

C. W. CORNELL,

O. O. COLLINS,

JOHN R. ALLPORT,

Attorneys for Appellant Southern Pacific Company.



